

NSW COURT OF APPEAL

**A YEAR IN REVIEW:
2021**

Introduction

This publication seeks to gather in a single, hyperlinked document, all of the decisions delivered by the New South Wales Court of Appeal in the course of 2021, together with speeches delivered by the previous Chief Justice and members of the Court of Appeal in 2021.

The publication is designed to allow a reader quickly to identify recent decisions delivered by the Court of Appeal in a given area of legal interest with greater specificity than simply by reference to generalised catchwords such as “Administrative law” or “Contract”, for example. Each of the decisions digested contains detailed catchwords with a hyperlink to the full text of the decision. It is hoped that this will provide a valuable resource for judges, practitioners, litigants, academics and students.

This publication follows an equivalent review of the decisions of the Court of Appeal in 2020 (see [A Year in Review: 2020](#)).

In 2021, the NSW Court of Appeal delivered 342 judgments. Of these 342 judgments, approximately 69.0% were delivered within 3 months of hearing, and approximately 42.3% were delivered within 4 weeks of hearing.

For all cases with a substantive hearing listed in 2021, the period between filing and hearing was, on average, 5.0 months. A number of matters were heard on an urgent basis, within days of an appeal or summons being filed.

In relation to new appeals, leave applications and summonses for judicial review, there were 340 new cases filed in the Court of Appeal during the year. This was slightly down from 346 cases during 2020. Of these new matters filed, 57.9% were from decisions of the Common Law and Equity Divisions of the Supreme Court of New South Wales (down from 60.4% in 2020); 28.2% were from decisions of the District Court of New South Wales (up from 24.6% in 2020) and 5.0% were from decisions of the New South Wales Civil and Administrative Tribunal (**NCAT**) (down from 8.7% in 2020). Appeals from NCAT directly to the Court of Appeal lie where a judicial officer participates in the NCAT decision. A small number of appeals and applications for judicial review were from decisions of the Land and Environment Court, the Personal Injury Commission and the Industrial Relations Commission of New South Wales.

In addition to Acting Justices Emmett and Simpson, a number of judges from the divisions of the Supreme Court were invited to sit *ad hoc* on certain appeals to the Court of Appeal from the District Court or NCAT. Preston CJ of LEC also joined the bench in a number of appeals in relation to Land and Environment Court matters. It should also be noted that a number of judges of appeal sat at first instance in both the Equity and Common Law Divisions of the Court in the course of the year.

Due to the COVID-19 pandemic, a significant number of appeals during 2021 were conducted virtually, using Cisco WebEx or Microsoft Teams.

In the course of 2021, the Court of Appeal also maintained and regularly updated its website, which can be found [here](#). This website includes sections on:

- Practice and procedure in the Court of Appeal, which includes links to the relevant practice note, legislation, regulations and rules together with sections dealing with “Common procedural and preliminary issues” and “Sources of New South Wales Court of Appeal Jurisdiction”. This part of the website can be found [here](#).
- Judicial review and the Court of Appeal’s supervisory jurisdiction. This part of the website can be found [here](#).
- The *Civil Liability Act 2002* (NSW), which is a detailed annotation of the Act providing summaries of significant decisions of the High Court of Australia, the Court of Appeal and other intermediate appellate courts in relation to specific sections of the Act. These annotations are regularly updated and a link to this part of the website can be found [here](#).
- the Court of Appeal’s Decisions of Interest Bulletin, which is published on a fortnightly basis and contains decisions of interest from the Court of Appeal, as well as from other Australian intermediate appellate courts, Asia-Pacific courts and other international courts. The latest Decisions of Interest Bulletin can be found [here](#).

Finally, although the number of public speaking engagements for members of the Court of Appeal was less than usual in 2021 due to the COVID-19 pandemic, a number of lectures were still delivered by the Chief Justice and judges of appeal. The latest speeches, as well as the speeches archive, can be found [here](#). Speeches delivered in 2021 by the Chief Justice and judges of appeal are listed at the end of this document.

22 March 2022

The Hon A. S. Bell
Chief Justice of New South Wales

Contents

Contents.....	3
1. Adoption and child welfare.....	12
<i>Care proceedings</i>	12
2. Administrative law (judicial review).....	14
<i>Adequacy of Reasons</i>	14
<i>Applications under Crimes (Appeal and Review) Act 2001 (NSW) Pt 7</i>	14
<i>Application for extension of time</i>	14
<i>Availability of judicial review</i>	15
<i>Error of law</i>	15
<i>Face of the record</i>	16
<i>Inquiry into criminal convictions</i>	16
<i>Judicially reviewable error</i>	16
<i>Jurisdictional error</i>	17
<i>Refusal to submit question to Court of Criminal Appeal</i>	20
<i>Role of decision-maker as contradictor</i>	21
3. Administrative law (other).....	21
<i>Administrative tribunals</i>	21
<i>Procedural fairness</i>	23
4. Appeals.....	24
<i>Abuse of process</i>	24
<i>Appeal by way of rehearing</i>	25
<i>Appeals on a question of law</i>	25
<i>Appeal from a judgment or order “as to costs only”</i>	25
<i>Attempt to re-agitate issues previously put</i>	26
<i>Challenge to credit findings</i>	26
<i>Challenge to earlier decision of this Court</i>	26
<i>Challenge to factual findings</i>	27
<i>Competency of appeal</i>	28
<i>Dismissal for want of due despatch</i>	29
<i>From exercise of discretion</i>	29
<i>Further evidence</i>	29
<i>Interlocutory decisions</i>	29
<i>Jurisdiction</i>	31

	<i>New point or issue raised on appeal</i>	31
	<i>Permanent stay of proceedings</i>	32
	<i>Review of order of single judge of appeal</i>	32
	<i>Right of appeal</i>	33
	<i>Show cause hearing</i>	33
	<i>Statutory threshold to bring an appeal</i>	33
	<i>Summary dismissal of proceedings</i>	34
	<i>Supervisory jurisdiction</i>	34
5.	Associations and Clubs.....	36
	<i>Rights, duties and liabilities of members</i>	36
	<i>Validity of meetings</i>	36
	<i>Voluntary Association</i>	36
6.	Banking & Finance.....	36
	<i>Guarantee and Indemnity</i>	36
	<i>Unconscionable conduct</i>	37
7.	Building & Construction	37
	<i>Claim for defective work</i>	37
	<i>Contracts</i>	38
	<i>Damages</i>	38
	<i>Expert determination clause in contract</i>	39
	<i>Payment claim</i>	39
8.	Civil procedure	40
	<i>Additional evidence on appeal</i>	40
	<i>Adjournment</i>	40
	<i>Application for expedition</i>	40
	<i>Application for leave to appeal</i>	41
	<i>Application for amendment to reasons</i>	47
	<i>Application for injunction pending appeal</i>	47
	<i>Application for stay of hearing and orders</i>	47
	<i>Application for stay pending special leave to appeal to the High Court</i>	50
	<i>Application to reopen by non-party</i>	50
	<i>Application to set aside subpoena</i>	51
	<i>Application to vacate hearing date</i>	51
	<i>Appointment of guardian ad litem</i>	52

<i>Bias</i>	52
<i>Cross-vesting</i>	53
<i>Discontinuance of proceedings</i>	54
<i>Extension of time to commence appeal</i>	54
<i>Extent of obligation by Court to consider and address voluminous submissions</i>	55
<i>Failure to file written submissions</i>	55
<i>Freezing orders</i>	55
<i>Joinder</i>	56
<i>Jurisdiction</i>	56
<i>Litigants in person</i>	56
<i>Necessary and proper parties</i>	57
<i>Pleadings</i>	57
<i>Pro bono referral</i>	59
<i>Procedural fairness</i>	59
<i>Production of documents</i>	60
<i>Removal of parties</i>	61
<i>Representative proceedings</i>	61
<i>Submissions</i>	61
<i>Suppression and non-publication orders</i>	62
<i>Transfer from Supreme Court to Court of Appeal</i>	62
9. Constitutional Law	62
<i>Chapter III of the Commonwealth Constitution</i>	62
<i>Inconsistency of laws</i>	63
‘ <i>Matter</i> ’	63
<i>Relationship between constitutional and non-constitutional issues</i>	63
<i>State legislative power</i>	64
10. Contract.....	64
<i>Agency agreement</i>	64
<i>Breach of contract</i>	64
<i>Conditions precedent</i>	65
<i>Construction and interpretation</i>	65
<i>Damages</i>	68
<i>Deeds</i>	68
<i>Due diligence costs</i>	69

<i>Essential terms</i>	69
<i>Expert determination clause</i>	69
<i>Frustration</i>	70
<i>Implied terms</i>	70
<i>Jurisdiction clause</i>	71
<i>Loan advance</i>	71
<i>Remedies</i>	71
<i>Repudiation</i>	72
<i>Restraint of trade</i>	73
<i>Retainers</i>	73
<i>Right to terminate</i>	74
<i>Share sale agreement</i>	74
<i>Termination</i>	74
<i>Total Failure of Consideration</i>	76
<i>Unconscionable conduct</i>	76
<i>Unitholders agreement</i>	76
11. Corporations	77
<i>Allotment of shares</i>	77
<i>Deregistration</i>	77
<i>Directors' duties</i>	77
<i>Minutes of board meetings</i>	78
<i>Ostensible authority</i>	78
<i>Take-over offers</i>	78
12. Costs	79
<i>Apportionment of costs</i>	79
<i>Calderbank letters</i>	79
<i>"Chorley" exception – recoverability of self-represented solicitors' costs</i>	80
<i>Claim for interest</i>	80
<i>Costs assessment</i>	80
<i>Costs of proceedings at first instance</i>	81
<i>General rule that costs follow the event</i>	81
<i>Gross sum costs order</i>	83
<i>Indemnity costs</i>	84
<i>Joint and several liability for costs</i>	85

	<i>Mixed outcome of proceedings</i>	85
	<i>Multiple parties</i>	85
	<i>Offers of compromise</i>	86
	<i>“Order otherwise” as to costs</i>	86
	<i>Partial success of a party</i>	86
	<i>Party/party costs</i>	87
	<i>Personal costs order</i>	89
	<i>Security for costs</i>	89
	<i>Third party costs orders</i>	90
	<i>Varying cost orders</i>	91
	<i>Wasted costs order</i>	91
	<i>Where appellant successful on appeal on a point different to that made at first instance</i>	91
13.	Crime	92
	<i>Appeal and review</i>	92
	<i>High risk offenders</i>	92
	<i>Post appeal review</i>	92
14.	Criminal procedure	93
	<i>Jurisdiction of Children’s Court</i>	93
	<i>Submission of questions of law to Court of Criminal Appeal</i>	93
15.	Defamation	94
	<i>Defences</i>	94
	<i>Publication</i>	94
	<i>Remedies</i>	95
16.	Disciplinary proceedings	95
	<i>Barristers’ professional misconduct</i>	95
17.	Dispute resolution.....	96
	<i>Arbitration</i>	96
18.	Dust diseases.....	96
	<i>Damages</i>	96
	<i>Restitution</i>	96
19.	Employment and industrial law	97
	<i>Contract of employment</i>	97
	<i>Discrimination</i>	98
	<i>Police officers</i>	98

	<i>Restraints of trade</i>	98
20.	Environmental and planning law	99
	<i>Aboriginal heritage</i>	99
	<i>Breach of development consent</i>	99
	<i>Consent</i>	99
	<i>Development applications</i>	99
	<i>Development consent</i>	100
	<i>Enforcement proceedings</i>	100
	<i>Heritage conservation</i>	101
	<i>Jurisdiction</i>	101
	<i>Native title</i>	101
21.	Equity	101
	<i>Breach of confidence</i>	101
	<i>Contempt</i>	102
	<i>Defences</i>	102
	<i>Equitable compensation</i>	102
	<i>Equitable interest in property</i>	103
	<i>Estoppel by representation</i>	103
	<i>Exclusion of right</i>	103
	<i>Fiduciary duties</i>	104
	<i>Injunctions</i>	105
	<i>Knowing assistants</i>	105
	<i>Promissory estoppel</i>	105
	<i>Proprietary estoppel</i>	105
	<i>Resulting trusts</i>	106
	<i>Specific performance</i>	106
	<i>Subrogation</i>	106
	<i>Trusts and trustees</i>	107
	<i>Unconscionable conduct</i>	108
22.	Evidence.....	108
	<i>Circumstantial evidence</i>	108
	<i>Cross-examination</i>	109
	<i>Exculpatory statements</i>	109
	<i>Expert evidence</i>	109

	<i>Further evidence on appeal</i>	109
	<i>Hearsay</i>	110
	<i>Inferences</i>	110
	<i>Opinion evidence</i>	111
	<i>Standard of proof</i>	111
23.	Gaming and wagering	111
	<i>Public lottery</i>	111
24.	Insurance.....	112
	<i>Appeal from decision joining insurer to proceedings</i>	112
	<i>Claims</i>	112
	<i>Construction of insurance contract</i>	112
	<i>Damages</i>	112
	<i>Non-disclosure and misrepresentation</i>	113
	<i>Professional indemnity policy</i>	113
	<i>Requirement of proof to satisfaction of insurer</i>	113
25.	Judgments and orders.....	114
	<i>Application to set aside or vary orders</i>	114
	<i>Duty to give reasons</i>	115
	<i>Examination orders</i>	116
	<i>Meaning of “judgment or order”</i>	116
	<i>Orders made in chambers</i>	116
	<i>Open court</i>	117
	<i>Pre-Judgment Interest</i>	117
	<i>Precedent</i>	117
	<i>Slip rule</i>	117
	<i>Stay of execution of writ for possession</i>	118
	<i>Variation of reasons due to change in circumstances</i>	118
26.	Land law	118
	<i>Adverse possession</i>	118
	<i>Co-ownership</i>	119
	<i>Damages</i>	119
	<i>Indefeasibility of title</i>	119
	<i>Standard form contract for sale of land</i>	120
	<i>Torrens title</i>	120

27.	Legal practitioners.....	121
28.	Limitation of Actions	124
	<i>Actions to recover land</i>	124
	<i>Operation of bar</i>	124
29.	Local Government.....	124
	<i>Powers, functions and duties</i>	124
30.	Medical practitioners	125
31.	Mental Health	127
	<i>Community Treatment Order</i>	127
	<i>Jurisdiction of Mental Health Review Tribunal</i>	127
32.	Occupations	127
	<i>Legal practitioners</i>	127
33.	Partnerships	129
	<i>Fiduciary relationship</i>	129
	<i>Liability of Partners</i>	129
	<i>Partnership property</i>	129
	<i>Rights and duties between partners</i>	129
34.	Private international law.....	130
	<i>Anti-suit injunction</i>	130
	<i>Anti-anti suit injunction</i>	130
	<i>Choice of law rules</i>	130
	<i>Exclusive jurisdiction agreement</i>	130
	<i>Foreign judgments and orders</i>	131
	<i>Inappropriate forum</i>	131
	<i>Non-exercise of jurisdiction</i>	131
	<i>Service outside of the jurisdiction</i>	131
35.	Police.....	132
	<i>Police Regulation (Superannuation) Act 1906 (NSW)</i>	132
36.	Real Property	133
	<i>Conveyancing</i>	133
	<i>Leases</i>	133
	<i>Mortgages</i>	134
37.	Sentencing.....	135
	<i>Intensive correction orders</i>	135

38.	Statutory interpretation.....	135
	<i>Amending legislation</i>	135
	' <i>Anthony Hordern</i> ' principle	136
	<i>Context</i>	136
	<i>Defined terms</i>	136
	<i>Departure from literal meaning</i>	137
	<i>Legislative purpose</i>	137
	<i>Literal approach</i>	138
	<i>Principle of legality</i>	139
	<i>Repealed statutes</i>	139
	<i>Use of extrinsic materials</i>	140
39.	Succession	140
	<i>Contested probate</i>	140
	<i>Family provision</i>	140
	<i>Substitute for specific devise</i>	141
	<i>Trusts and trustees</i>	142
40.	Summary offences	142
	<i>Where applicant's claim summarily dismissed on ground that statute-barred</i>	142
41.	Taxation.....	142
	<i>Land tax</i>	142
42.	Torts (negligence)	143
	<i>Apportionment of responsibility</i>	143
	<i>Breach of duty of care</i>	143
	<i>Causation</i>	145
	<i>Contributory negligence</i>	146
	<i>Damages</i>	147
	<i>Dangerous recreational activities</i>	148
	<i>Economic loss</i>	148
	<i>Employer liability</i>	149
	<i>Medical negligence</i>	149
	<i>Motor vehicle accidents</i>	149
	<i>Negligent misstatement</i>	150
	<i>Professional negligence</i>	150
	<i>Public authorities</i>	151

	<i>Standard of care</i>	151
43.	Torts (other).....	152
	<i>Assault and battery</i>	152
	<i>Deceit</i>	152
	<i>False imprisonment</i>	153
	<i>Malicious prosecution</i>	153
	<i>Nuisance</i>	153
	<i>Trespass</i>	154
44.	Trade practices.....	154
	<i>Industry codes</i>	154
	<i>Misleading or deceptive conduct</i>	154
45.	Traffic law and transport.....	155
	<i>Aviation</i>	155
46.	Valuation.....	156
	<i>Compulsory acquisition of land</i>	156
	<i>Contingencies</i>	156
47.	Vexatious proceedings.....	156
	<i>Application to set aside vexatious proceedings order</i>	156
	<i>Vexatious litigants</i>	156
	<i>Where vexatious proceedings order later set aside on appeal</i>	157
48.	Workers compensation.....	157
	<i>Causal link between employment and harm suffered</i>	157
	<i>Degree of permanent impairment</i>	157
	<i>Entitlement to compensation</i>	158
	<i>Medical assessment</i>	158
	<i>Non-economic loss</i>	159
	<i>Uninsured liabilities</i>	159

1. Adoption and child welfare

Care proceedings

[GR v Secretary, Department of Communities and Justice \[2021\] NSWCA 99](#)

CHILD WELFARE – care proceedings – applicant alleged Children’s Court acted without jurisdiction and Supreme Court consequently erred in dismissing judicial review application – leave to appeal refused

CHILD WELFARE – care proceedings – guardian ad litem appointed by Supreme Court – whether court required to appoint guardian ad litem if child or young person who is a party is incapable of giving proper instructions or whether court has discretion to do so – interaction between ss 98(2A) and 100 *Care Act* – reasonable argument and of some general importance – leave to appeal granted on limited basis

[GR v The Secretary, Department of Communities and Justice \[2021\] NSWCA 169](#)

CHILD WELFARE – care proceedings – practice and procedure – application to vary final judgment – whether notice of motion should be transferred to Equity Division – motion dismissed

[GR v Secretary, Department of Communities and Justice \[2021\] NSWCA 267](#)

CHILD WELFARE - care proceedings - interlocutory application - whether orders should be made allowing child to live with mother or allowing daily contact - whether tutor should be appointed

[GR v Secretary, Department of Communities and Justice; The Minister Families, Disabilities and Community Services \[2021\] NSWCA 234](#)

CHILD WELFARE – care proceedings – interlocutory application – whether care order should be stayed – whether orders should be made allowing child to live with mother or allowing daily contact – whether *parens patriae* jurisdiction should be invoked.

[GR v Secretary, Department of Communities and Justice; Secretary, Department of Communities and Justice v BW \(a pseudonym\) \[2021\] NSWCA 157](#)

CHILD WELFARE – care proceedings – statutory construction – interpretation – where guardian ad litem appointed for a child and young person in separate proceedings – where court found child and young person was incapable of giving proper instructions to a legal representative – whether appointment of guardian ad litem mandatory or discretionary – Children and Young Persons (Care and Protection) Act 1998 (NSW) – interaction between ss 98(2A) and 100 of the Act

CHILD WELFARE – care proceedings – where guardian ad litem appointed for a young person by Supreme Court – whether young person incapable of giving proper instructions to a legal representative

2. Administrative law (judicial review)

Adequacy of Reasons

[Gibson v Director of Public Prosecutions \(NSW\) \(No 2\) \[2021\] NSWCA 218](#)

JUDGMENTS AND ORDERS – where no formal order was made by the primary judge dismissing the applicant’s request to state a case to the Court of Criminal Appeal – where no reasons were published by the primary judge for declining the applicant’s request – where applicant was advised of the primary judge’s refusal to state a case via an email from the Registrar of the Local Court – general requirement for judgments to be given in open court where practicable to do so – requirement for clarity as to when a judgment has been given – requirement that a judgment reaches the parties

[Sydney Trains v Batshon \[2021\] NSWCA 143](#)

ADMINISTRATIVE LAW - workers compensation - examination by approved medical specialist - request for re-examination by appeal panel refused - primary judge held that request not considered by appeal panel - appeal panel in fact considered request - adequacy of reasons of appeal panel - whether denial of procedural fairness by primary judge - whether any denial could be material in light of the right of appeal by way of rehearing - whether other judicially reviewable errors in appeal panel’s decision - consideration of differences in assessment regimes under workers compensation and motor accident legislation - appeal allowed and decision of appeal panel reinstated

Applications under Crimes (Appeal and Review) Act 2001 (NSW) Pt 7

[Folbigg v Attorney General of New South Wales \[2021\] NSWCA 44](#)

JUDICIAL REVIEW – justiciability – challenge to opinion of judicial officer holding inquiry under *Crimes (Appeal and Review) Act 2001* (NSW), Pt 7 – whether exercise of prerogative of mercy – whether decisions of intermediate courts of appeal should be followed – whether procedure under *Criminal Code* (Qld), s 672A, distinguishable

Application for extension of time

[Blissett v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 253](#)

ADMINISTRATIVE LAW – judicial review – application for review of District Court decision dismissing appeal from conviction in Local Court – application for extension of time – where review limited to jurisdictional error on part of District Court – whether personal service of court attendance notice in accordance with Local Court Rules a condition for exercise of

Local Court's summary criminal jurisdiction – whether applicant denied procedural fairness – whether primary judge erred in rejecting applicant's "claim of right" defence – no arguable jurisdictional error of District Court

[Nguyen v Nguyen \[2021\] NSWCA 161](#)

APPEAL – where applicant incorrectly filed an application for leave to appeal – where, although leave to appeal was not required, an extension of time in which to bring the appeal was required – no satisfactory explanation provided for delay in commencing appeal proceedings – where no injustice would be suffered by the applicant if an extension of time to appeal was refused – application for extension of time to appeal refused

[Ulladulla Creative Images Pty Ltd v Tibbles \[2021\] NSWCA 200](#)

APPEALS – Procedure – Time limits – Extension of time to appeal – Where appeal filed one day out of time – Extension not opposed – No prejudice – Extension granted

Availability of judicial review

[Charlton v National Australia Bank Limited \[2021\] NSWCA 111](#)

ADMINISTRATIVE LAW – judicial review – certificate under s 11 of *Farm Debt Mediation Act 1994* (NSW) – whether judicial review available

[Huynh v Attorney General \(NSW\) \[2021\] NSWCA 297](#)

JUDICIAL REVIEW – exercise of administrative power by Supreme Court judge – whether acting under a Commonwealth enactment – availability of judicial review – whether decision reviewable by Federal Court

[Singh v State of NSW; Singh v Lekhwar \[2021\] NSWCA 260](#)

JUDICIAL REVIEW – summonses seeking judicial review of decision of Supreme Court orders – whether judicial review lies to Court of Appeal – *Penson v Titan National Pty Ltd* [2015] NSWCA 404 applied – summonses dismissed

Error of law

[Eliezer v Sydney Water Corporation \[2021\] NSWCA 300](#)

JUDICIAL REVIEW – decision of Local Court of NSW (Small Claims Division) – decision of District Court of NSW on appeal from Local Court – whether time to challenge Local Court decision should be extended – challenge not fairly arguable – grounds of challenge to District Court decision – no jurisdictional error or error of law on the face of record established

[KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc \[2021\] NSWCA 216](#)

ADMINISTRATIVE LAW – judicial review – error of law – review of decision of consent authority – construction of State Environmental Planning Policy – whether decision-maker considered conditions aimed at ensuring that greenhouse gas emissions are minimised to the greatest extent practicable

ADMINISTRATIVE LAW – judicial review – error of law – obligation to consider case presented by applicant – minimising scope 3 greenhouse gas emissions of thermal coal – whether refusal of proposal could lead to use of inferior resource with higher emissions

ADMINISTRATIVE LAW – judicial review – error of law – reference in reasons to “no evidence” – where information before decision-maker – whether reasons indicated decision-maker not satisfied that information provided rational basis for finding sought

Face of the record

[Spencer v Coshott \[2021\] NSWCA 235](#)

JUDICIAL REVIEW — what constitutes “the record” for the purposes of error of law on the face of the record

Inquiry into criminal convictions

[Folbigg v Attorney General of New South Wales \[2021\] NSWCA 44](#)

ADMINISTRATIVE LAW – judicial review – inquiry into criminal convictions – challenge to opinion that no reasonable doubt attended the convictions – whether opinion arbitrary, capricious or irrational – whether relevant material disregarded

Judicially reviewable error

[Hastwell v Health Care Complaints Commission \[2021\] NSWCA 22](#)

ADMINISTRATIVE LAW - Health Care Complaints Commission - decision not to take further steps to progress complaint against psychiatrist - decision reviewed and confirmed by Commission - primary judge dismissed summons seeking judicial review - whether judicial review available - whether any judicially reviewable error disclosed by decisions - leave

refused

Jurisdictional error

[AAI Ltd t/as AAMI v Chan \[2021\] NSWCA 19](#)

ADMINISTRATIVE LAW - judicial review - *Motor Accidents Compensation Act 1999* (NSW), s 62 - application for further assessment - proper officer not to order further assessment unless additional relevant information capable of having a material effect on outcome of previous assessment - further medical opinions covering similar ground to opinions previously considered - further medical opinions accepted to be additional relevant information - whether judicially reviewable error in proper officer's decision that further medical opinions not capable of having material effect - need for identification of jurisdictional error or error of law on face of record - primary judge erred in finding reviewable error - appeal allowed and decision of proper officer restored

[Ahern v Aon Risk Services Australia Ltd \[2021\] NSWCA 166](#)

ADMINISTRATIVE LAW – judicial review – orders of District Court dismissing appeal on questions of law from costs assessment review panel – where District Court decided reasons given by review panel were adequate – whether jurisdictional error in applying incorrect test for adequacy of reasons – whether error of law on the face of the record in relation to decision that reasons adequate

[Belan v Office of the Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 96](#)

ADMINISTRATIVE LAW - judicial review - jurisdictional error - appeal to District Court from conviction and sentence imposed by Local Court - plaintiff granted bail pending determination of appeal - District Court dismissed appeal against conviction and revoked bail without hearing from plaintiff - District Court granted adjournment for sentence appeal - at subsequent hearing of sentence appeal, District Court refused disqualification application, gave *Parker* warning and sentence appeal was withdrawn - conceded breach of procedural fairness in revocation of bail - whether District Court decisions affected by apprehended bias - whether jurisdictional error in dismissing conviction appeal - summons dismissed

[Blissett v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 253](#)

ADMINISTRATIVE LAW – judicial review – application for review of District Court decision dismissing appeal from conviction in Local Court – application for extension of time – where review limited to jurisdictional error on part of District Court – whether personal service of court attendance notice in accordance with Local Court Rules a condition for exercise of Local Court's summary criminal jurisdiction – whether applicant denied procedural fairness –

whether primary judge erred in rejecting applicant's "claim of right" defence – no arguable jurisdictional error of District Court

[Day v SAS Trustee Corporation \[2021\] NSWCA 71](#)

ADMINISTRATIVE LAW – constructive failure to exercise jurisdiction – where appellant alleges primary judge failed to address "substantial, clearly articulated" arguments – whether arguments based on "established facts" – whether primary judge's approach raised those arguments for separate determination

[Eliezer v Sydney Water Corporation \[2021\] NSWCA 300](#)

JUDICIAL REVIEW – decision of Local Court of NSW (Small Claims Division) – decision of District Court of NSW on appeal from Local Court – whether time to challenge Local Court decision should be extended – challenge not fairly arguable – grounds of challenge to District Court decision – no jurisdictional error or error of law on the face of record established

[Eliezer v The Council of St Andrew's Cathedral School \[2021\] NSWCA 144](#)

ADMINISTRATIVE LAW – application for orders in the nature of certiorari quashing decision of District Court dismissing an appeal from the Small Claims Division of the Local Court and the decision of the Local Court for jurisdictional error and error of law on the face of the record – where appeal to District Court lies only on basis of lack of jurisdiction or denial of procedural fairness – where applicants contended District Court judge misapprehended the meaning of "lack of jurisdiction", failed to make a bona fide assessment of the grounds of appeal and failed to give adequate reasons – where applicants' challenge to the Local Court decision out of time – where applicants contended that Local Court assessor failed to take into account "jurisdictional facts", gave judgment notwithstanding notice of an alleged counter claim or set-off and otherwise invalidly exercised jurisdiction

[Franklin v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 83](#)

CIVIL LAW – judicial review – jurisdictional error – whether District Court erred in failing to state a case to the Court of Criminal Appeal – power of Judge to decline to stquestion of law – tension in authorities – unnecessary to resolve conflict in authorities – where nine of ten questions raised were not relevant questions of law – whether questions frivolous or baseless – where remaining question raised a material question of law concerning admissibility of probative evidence – jurisdictional error established

[Gibson v Director of Public Prosecutions \[2021\] NSWCA 176](#)

PRACTICE AND PROCEDURE – judicial review – refusal by District Court to state case to Court of Criminal Appeal – application to vacate hearing date – further charge pending in Local Court – stress – lack of medical evidence – no basis to delay hearing by several months

[Huang v Nazaran \[2021\] NSWCA 243](#)

JUDGMENTS AND ORDERS – supervisory jurisdiction – judicial review – application proceeding in Local Court special jurisdiction dismissed – where appeal to District Court under *Local Court Act 2007* (NSW), s 70(1) dismissed for lack of jurisdiction – whether jurisdictional error in dismissing appeal

[McNab v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 298](#)

COURTS AND JUDGES – Supreme Court – supervisory jurisdiction – District Court – jurisdictional error – appeal to District Court from conviction in Local Court – complainant not called as witness on appeal – District Court judge had regard to magistrate’s credibility findings – whether jurisdictional error by District Court

COURTS AND JUDGES – Supreme Court – Supervisory jurisdiction – District Court – jurisdictional error – applicant convicted in Local Court – conviction appeal to District Court – onus of proof on prosecutor to establish guilt beyond reasonable doubt – whether appellant required to establish factual, legal or discretionary error by magistrate – whether requirement that appellant demonstrate error reverses onus of proof – *Crimes (Appeal and Review) Act 2001* (NSW) s 18

[Public Service Association and Professional Officers’ Association Amalgamated Union of New South Wales v Industrial Relations Secretary of New South Wales \[2021\] NSWCA 64](#)

ADMINISTRATIVE LAW – jurisdictional error – challenge to determinations of Industrial Relations Commission – whether plaintiffs were denied procedural fairness – whether Commission failed to have regard to relevant consideration – whether Commission erred in placing onus on moving parties – whether decision was legally unreasonable

[Purcell v The Director of Public Prosecutions \[2021\] NSWCA 269](#)

JUDICIAL REVIEW – District Court – conviction appeal from Local Court dismissed as outside three month time limit – erroneous as calculation should have excluded day of lodgement – whether error jurisdictional – whether necessary to show error was “material” – Held – relief granted

[Queanbeyan Racing Club Ltd v Burton \[2021\] NSWCA 304](#)

ADMINISTRATIVE LAW – judicial review – jurisdictional error – extent of functions and powers of tribunal - Workers Compensation Commission medical appeal panel – procedural unfairness –scope of procedural fairness determined by reference to statutory scheme – no opportunity given to address panel on definition of medical condition – medical experts’ function is to form opinion as to medical condition

[Quinn v Commonwealth Director of Public Prosecutions \[2021\] NSWCA 294](#)

JUDICIAL REVIEW – jurisdictional error – applicant pleaded guilty to three offences including using carriage service to menace, harass or cause offence – applicant sentenced on basis of agreed facts – Local Court imposed full-time custodial sentence – District Court allowed appeal imposing a lesser full-time custodial sentence – whether District Court fell into jurisdictional error when rejecting submission that sentence be served by intensive correction order – significance of community safety being paramount consideration – significance of requirement to consider whether intensive correction order more likely to address risk of reoffending – part of reasoning in *Wany v Director of Public Prosecutions* (2020) 103 NSWLR 620; [2020] NSWCA 318 disapproved – error in agreed facts concerning number of text messages giving rise to carriage service offence – agreed facts stated applicant had sent 24,459 text messages – in fact applicant had sent 11,204 messages – whether factual error gave rise to jurisdictional error – no jurisdictional error established and summons dismissed

[Stanley v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 337](#)

JUDICIAL REVIEW – jurisdictional error – applicant pleaded guilty to various offences under *Firearms Act 1996* (NSW) – applicant sentenced on basis of agreed facts – Local Court imposed full-time custodial sentence of three years – appeal to District Court pursuant to s 11(1) of *Crimes (Appeal and Review) Act 2001* (NSW) – applicant raised submission that sentence of imprisonment should be served by way of intensive correction order – District Court dismissed appeal – whether District Court fell into jurisdictional error when rejecting submission seeking intensive correction order – where s 66(2) of *Crimes (Sentencing Procedure) Act 1999* (NSW) required District Court judge to assess whether making an intensive correction order or ordering full-time detention was more likely to address applicant’s risk of reoffending – whether District Court judge conducted assessment as required by s 66(2) – where s 66(1) expresses that community safety is paramount consideration in deciding whether to make an intensive correction order – whether failure to conduct assessment contemplated by s 66(2) amounted to jurisdictional error

Refusal to submit question to Court of Criminal Appeal

[Franklin v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 83](#)

CIVIL LAW – judicial review – jurisdictional error – whether District Court erred in failing to state a case to the Court of Criminal Appeal – power of Judge to decline to state a question of law – tension in authorities – unnecessary to resolve conflict in authorities – where nine of

ten questions raised were not relevant questions of law – whether questions frivolous or baseless – where remaining question raised a material question of law concerning admissibility of probative evidence – jurisdictional error established

[Yenuga v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 293](#)

CRIME – Appeal and review – Stated case – Refusal to state a case – Application for judicial review – Where application before District Court raised no questions of law – Where all grounds of review in this Court represent challenges to factual findings or are otherwise devoid of merit – No jurisdictional error established – Attempt to circumvent lack of further right of appeal on grounds of fact – Application dismissed

Role of decision-maker as contradictor

[Hastwell v Legal Services Commissioner \[2021\] NSWCA 20](#)

PROCEDURE – judicial review – role of decision-maker as contradictor in challenge to decision – exception to principle in *The Queen v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13; [1980] HCA 13 – whether contravention would be appealable error

3. Administrative law (other)

Administrative tribunals

[Council of the New South Wales Bar Association v EFA \(a pseudonym\) \[2021\] NSWCA 339](#)

ADMINISTRATIVE LAW – particular administrative bodies – New South Wales Civil and Administrative Tribunal – Occupational Division – subject matter of power or decision – disciplinary decisions – legal practitioners – barristers – misconduct and discipline – professional misconduct – where respondent engaged in demeaning, humiliating and inexcusable conduct towards a female clerk at a dinner – where the Tribunal found that the respondent had not engaged in professional misconduct – whether the Tribunal erred in failing to find that the respondent’s conduct would justify a determination that the respondent was not a fit and proper person to engage in legal practice – whether the Tribunal erred in its assessment of the seriousness of the respondent’s conduct by imposing only a formal reprimand

[Gautam v Health Care Complaints Commission \[2021\] NSWCA 85](#)

ADMINISTRATIVE LAW – particular administrative bodies – NSW Civil and Administrative Tribunal – complaint by Health Care Complaints Commission about medical practitioner – adequacy of reasons

[JKL by his tutor Jennifer Thompson v Justice Health and Forensic Mental Health Network \[2021\] NSWCA 94](#)

COURTS AND TRIBUNALS – Mental Health Review Tribunal – whether Tribunal’s power to transfer forensic patients into a mental health facility includes power to specify when transfer is to occur and to what particular mental health facility a patient is to be transferred to.

MENTAL HEALTH – Mental Health Review Tribunal – jurisdiction – whether Mental Health Review Tribunal had power to order the transfer of a forensic patient to a mental health facility “when a bed becomes available” – whether the Tribunal took into account an irrelevant consideration when it had regard to the availability of beds at a specific mental health facility in the course of exercising its power to make a transfer order under s 48 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) – where the relevant statutory context supported considerations of “practicability” as being relevant to the exercise of the transfer power under s 48 of the Act.

STATUTORY INTERPRETATION – jurisdiction – Mental Health Review Tribunal – whether Mental Health Review Tribunal had power to order the transfer of a forensic patient to a mental health facility “when a bed becomes available” – where the relevant statutory context supported considerations of “practicability” as being relevant to the exercise of the transfer power under s 48 of the Act.

STATUTORY INTERPRETATION – jurisdiction – Mental Health Review Tribunal – whether power to transfer a patient to or from a mental health facility includes power to specify when such a transfer should occur – implied incidental power – source of power – extent of implied incidental power

[Medical Council of New South Wales v Smithson \[2021\] NSWCA 53](#)

ADMINISTRATIVE LAW – particular administrative bodies – NSW Civil and Administrative Tribunal – appeal under Health Practitioner Regulation National Law (NSW) s 159 against decision of Council under s 150 – hearing de novo – essential task of the Tribunal in such an appeal – error conceded – remittal of matter to the Tribunal

[Kirby v Health Care Complaints Commission \[2021\] NSWCA 138](#)

ADMINISTRATIVE LAW – Particular administrative bodies – Health Care Complaints Commission – Health Care Complaints Act 1993 (NSW) – Registered health practitioner – Whether the Commission failed to consult the appropriate professional council under s 39(2) before making a prohibition order under s 41A – Where the complaint against the health practitioner concerned conduct outside the field of his registration – Whether failure to consult the appropriate professional council rendered the prohibition order invalid.

[Kirby v Health Care Complaints Commission \[2021\] NSWCA 139](#)

PROFESSIONS AND TRADES – health practitioners – dental practitioners – whether Commission referred a complaint against registered dentist to the Tribunal pursuant to s 145C of the National Law

Procedural fairness

[Folbigg v Attorney General of New South Wales \[2021\] NSWCA 44](#)

ADMINISTRATIVE LAW – procedural fairness – improperly rejecting evidence – test of relevance for purposes of inquiry – failure to consider submissions – failure to consider good character evidence – failing to reopen inquiry

[Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary of New South Wales \[2021\] NSWCA 64](#)

ADMINISTRATIVE LAW – jurisdictional error – challenge to determinations of Industrial Relations Commission – whether plaintiffs were denied procedural fairness – whether Commission failed to have regard to relevant consideration – whether Commission erred in placing onus on moving parties – whether decision was legally unreasonable

[Queanbeyan Racing Club Ltd v Burton \[2021\] NSWCA 304](#)

ADMINISTRATIVE LAW – judicial review – jurisdictional error – extent of functions and powers of tribunal - Workers Compensation Commission medical appeal panel – procedural unfairness – scope of procedural fairness determined by reference to statutory scheme – no opportunity given to address panel on definition of medical condition – medical experts' function is to form opinion as to medical condition

[Sydney Trains v Batshon \[2021\] NSWCA 143](#)

ADMINISTRATIVE LAW - workers compensation - examination by approved medical specialist - request for re-examination by appeal panel refused - primary judge held that request not considered by appeal panel - appeal panel in fact considered request - adequacy of reasons of appeal panel - whether denial of procedural fairness by primary judge - whether any denial could be material in light of the right of appeal by way of rehearing - whether other judicially reviewable errors in appeal panel's decision - consideration of differences in assessment regimes under workers compensation and motor accident legislation - appeal allowed and decision of appeal panel reinstated

4. Appeals

Abuse of process

[Boros v Pages Property Investments Pty Ltd \[2021\] NSWCA 50](#)

APPEALS – procedure – stay of appeal pending satisfaction of judgment and costs orders below – where quantity of costs not agreed or assessed – where judgment and other costs orders the subject of the appeal – whether appeal an abuse of process

[CBRE \(V\) Pty Limited v Trilogy Funds Management Limited \[2021\] NSWCA 316](#)

CIVIL PROCEDURE – summary dismissal of proceedings – abuse of process – separate proceedings brought by different plaintiffs against same defendant – overlapping factual and legal issues – judgment delivered in first proceedings – application for leave to appeal against primary judge’s refusal to summarily dismiss second proceedings – actions of plaintiff in second proceedings not unreasonable – absence of any decisive overriding consideration of public interest – no abuse of process in second proceedings

[Hana v Shad Legal Services Pty Ltd \[2021\] NSWCA 258](#)

CIVIL PROCEDURE — pleadings — striking out — abuse of process — where statement of claim pleads fact inconsistent with finding of Court of Appeal in earlier proceedings — statement of claim constitutes collateral attack on Court of Appeal’s decision — statement of claim struck out as abuse of process

[Hassan v Sydney Local Health District \[2021\] NSWCA 97](#)

CIVIL PROCEDURE – Court of Appeal – Notice of motion – Application to issue subpoenas – Where already before full bench on application to reopen – Abuse of process – Application dismissed

CIVIL PROCEDURE – Court of Appeal – Notice of motion – Application to refer persons to prosecuting authorities – Where such relief inappropriate and unavailable – Abuse of process – Application dismissed

[Hassan v Sydney Local Health District \(No 4\) \[2021\] NSWCA 187](#)

CIVIL PROCEDURE – abuse of process – where the Court may exercise its inherent powers to prevent an abuse of its process – where the Court deemed it appropriate that an order in the nature of that made in *Teoh v Hunters Hill Council (No 4)* [2011] NSWCA 324 be made

CIVIL PROCEDURE – notice of motion – where applicant filed notice of motion challenging earlier orders by judges of the Court and in part repeating relief that had previously been sought and refused – where the notice of motion was dismissed as an abuse of process or as being either vexatious or oppressive, or as disclosing no arguable basis for the relief

sought

Appeal by way of rehearing

[DK v Director of Public Prosecutions \[2021\] NSWCA 134](#)

APPEALS – Nature of appeal – Appeal by way of rehearing – Appeal against sentence brought by the Director of Public Prosecutions under s 23(1) of the *Crimes (Appeal and Review) Act* – Whether Director required to establish error – whether the District Court has a “residual discretion” to dismiss the appeal notwithstanding a finding that the sentencing decision entailed error

[Lunney v Director of Public Prosecutions \[2021\] NSWCA 186](#)

APPEALS – nature of appeal – appeal by way of rehearing – appeal against conviction under s 11(1) of the *Crimes (Appeal and Review) Act* – where applicant appealed from the Local Court to the District Court alleging specific errors on the part of the Local Court – whether the District Court was required to undertake a complete review of the whole of the evidence and form its own view as to the applicant’s guilt regardless of the issues raised in the appeal – absence of any clearly articulated argument the resolution of which required a review of the whole of the evidence

Appeals on a question of law

[Vitality Works Australia Pty Ltd v Yelda \(No 2\) \[2021\] NSWCA 147](#)

CIVIL PROCEDURE – appeal on question of law

Appeal from a judgment or order “as to costs only”

[Housman v Camuglia \[2021\] NSWCA 106](#)

APPEALS - requirement of leave - whether appellants required leave for separate challenge to costs order based on rejection of Calderbank offer in circumstances where there was an appeal as of right - construction of “an appeal from a judgment or order as to costs only” in *District Court Act 1973* (NSW), s 127(2)(b) - history of s 127(2)(b) and s 101(2)(c) of *Supreme Court Act 1970* (NSW) - history of United Kingdom antecedents - appellants entitled to challenge special costs order as of right

[Muriniti v Mercia Financial Solutions Pty Ltd \[2021\] NSWCA 180](#)

APPEALS – application for leave to appeal – whether leave to appeal is required by a legal practitioner who is subject to a third party costs order, assuming that the monetary threshold under s 101(2)(r) of the Supreme Court Act 1970 (NSW) is satisfied – leave to appeal not required pursuant to s 101(2)(c) of the Supreme Court Act on the basis that the decision was not one “as to costs only” appeal

Attempt to re-agitate issues previously put

[Hassan v Sydney Local Health District \(No 4\) \[2021\] NSWCA 187](#)

CIVIL PROCEDURE – notice of motion – where applicant filed notice of motion challenging earlier orders by judges of the Court and in part repeating relief that had previously been sought and refused – where the notice of motion was dismissed as an abuse of process or as being either vexatious or oppressive, or as disclosing no arguable basis for the relief sought

[Mahommed v Unicomb \[2021\] NSWCA 108](#)

CIVIL PROCEDURE — proceedings in Equity Division dismissed by first judge — application to second judge to set aside dismissal — application refused as in substance simply an attempt to reargue first decision — leave to appeal against second decision refused

Challenge to credit findings

[ET-China.com International Holdings Ltd v Cheung \[2021\] NSWCA 24](#)

APPEALS – appellate review of factual findings – appellate review of credit findings – interaction between contemporaneous documents and witness testimony – whether an adverse credit finding on one aspect of a witness’ evidence requires that his or her evidence should be rejected on all issues

[Johnson v Mackinnon \[2021\] NSWCA 152](#)

APPEALS – From findings of fact and credibility – Function of appellate court – Circumstantial case – Briginshaw standard – Inferences from primary facts – Whether open to be comfortably satisfied various factual findings, including inference that appellant knew of false proposal representations

Challenge to earlier decision of this Court

[Muriniti v Mercia Financial Solutions Pty Ltd \[2021\] NSWCA 180](#)

APPEALS – challenge to earlier decision of this Court on the basis that it was “plainly wrong” – where no real attempt was made to satisfy the requirements for a challenge to a decision of this Court as outlined in *Gett v Tabet* (2009) 254 ALR 504; [2009] NSWCA 76

Challenge to factual findings

[Cook v Sirius International Insurance Corporation Australian Branch \[2021\] NSWCA 192](#)

APPEALS – From findings of fact – Function of appellate court – Where primary judgment not dependent on credibility findings – Court obligated to conduct a real review of the evidence and reasons

[Drive My Car Rentals Pty Ltd v Gabriel \[2021\] NSWCA 73](#)

APPEALS – finding of fact – where Magistrate found that plaintiff’s son owned the vehicle – where ownership finding informed by Magistrate’s assessment of the credibility and reliability of the plaintiff and his son – whether Magistrate’s decision was glaringly improbable or contrary to compelling inferences – where small amount in issue – whether leave to appeal should be granted

[ET-China.com International Holdings Ltd v Cheung \[2021\] NSWCA 24](#)

APPEALS – appellate review of factual findings – appellate review of credit findings – interaction between contemporaneous documents and witness testimony – whether an adverse credit finding on one aspect of a witness’ evidence requires that his or her evidence should be rejected on all issues

[Gautam v Health Care Complaints Commission \[2021\] NSWCA 85](#)

APPEALS – leave to appeal – on factual findings – whether appropriate to depart from a demeanour-based credit finding

[Jagatramka v Wollongong Coal Limited \[2021\] NSWCA 61](#)

APPEALS – from finding of fact – inferences from primary facts – two competing hypotheses on the evidence – where primary judge applied a process of inferential reasoning based on circumstantial evidence – whether primary judge erred in applying this process to make findings of fact – duty of an appellate court to decide for itself which of the two hypotheses was the more probable – appellate court to discharge this duty by weighing the conflicting evidence and drawing its own inferences and conclusions

[Prouten v Chapman \[2021\] NSWCA 207](#)

APPEALS – From findings of fact and credit findings – Function of appellate court – Restraints on appellate interference – Obligation to undertake a real review of the evidence and reasons – Where overarching adverse credibility finding made – Where appellant’s account of incident rejected – Whether credit finding informed by assessment of demeanour or only by inconsistencies in evidence – Where demeanour neither expressly relied upon nor disclaimed – Court able to interfere with factual findings but fresh findings would require retrial

[Yesilhat v Calokerinos \[2021\] NSWCA 110](#)

APPEALS – from findings of fact – findings likely affected by impressions about credibility and reliability of witnesses – whether findings “glaringly improbable” – *Fox v Percy* test

[Johnson v Mackinnon \[2021\] NSWCA 152](#)

APPEALS – From findings of fact and credibility – Function of appellate court – Circumstantial case – Briginshaw standard – Inferences from primary facts – Whether open to be comfortably satisfied various factual findings, including inference that appellant knew of false proposal representations

Competency of appeal

[Barbieri v Pirovic \[2021\] NSWCA 341](#)

CIVIL PROCEDURE – Court of Appeal – Objections to competency of appeal – Appeal out of time – No compliance by appellant with directions for filing of affidavits and submissions on question of extension of time – No motion for dismissal filed by respondent – First default by appellant in this Court – Indulgence granted to appellant but with self-executing dismissal of appeal if orders not complied with

[Boros v Pages Property Investments Pty Ltd \[2021\] NSWCA 50](#)

APPEALS – incompetence – where relief sought in notice of appeal includes setting aside money judgment against a defendant other than the appellant – where appeal not brought by or on behalf of other defendant – whether to strike out of notice of appeal reference to judgment against other defendant – inherent power to strike out

[Singh v Khan \[2021\] NSWCA 281](#)

CIVIL PROCEDURE – Court of Appeal – Objections to competency of appeal – Whether

appeal from exercise of cross-vested jurisdiction and so lies only to Federal Court – Whether leave to appeal required

Dismissal for want of due despatch

[Denny v RSPCA NSW \[2021\] NSWCA 342](#)

CIVIL PROCEDURE – Court of Appeal – Summary disposal – Dismissal of proceedings – Want of due despatch – Multiple defaults by applicant to date – Submissions now filed and applicant not presently in default – Remaining need for proceedings to be brought into order – Orders made for filing of Amended Summons but with self-executing dismissal of application if not complied with

From exercise of discretion

[Huang v The Owners of Strata Plan No 7632 \[2021\] NSWCA 194](#)

APPEALS — from exercise of discretion — procedural decisions — refusal to extend time for filing summons — reasons for delay — significance of first instance decision decided on basis of authority later overturned on appeal — *interest rei publicae ut sit finis litium*

Further evidence

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

APPEALS – Further evidence – Evidence not available at hearing – Evidence of transcripts, orders, and reasons of English courts – Motion not required for Court to have regard to such evidence – No reason to permit other further evidence identified in motion – Motion dismissed with costs

Interlocutory decisions

[Alexakis v Health Care Complaints Commission \[2021\] NSWCA 217](#)

APPEALS – Civil and Administrative Tribunal, Occupational Division – refusal of stay – interlocutory decision – requirement for leave to appeal – applicable principles – error of law – issue of principle – demonstrated unfairness

[EFQ \(a pseudonym\) v Medical Council of New South Wales \[2021\] NSWCA 167](#)

CIVIL PROCEDURE – application for leave to appeal from an interlocutory decision of the Civil and Administrative Tribunal of NSW – where Tribunal refused to grant the applicant an extension of time in which to appeal from a decision of the Medical Council of NSW, which had imposed a condition on the applicant’s registration as a health practitioner that she not practise medicine – where applicant sought to appeal the Medical Council’s decision over one year after it provided its reasons for imposing the relevant condition – where applicant contended that her appeal was as of right and that no extension of time was required to be granted by the Tribunal – whether Tribunal was correct to hold that an extension of time within which to appeal from the Council’s decision was required – whether Tribunal’s discretion miscarried in refusing the applicant an extension of time

[Melhem v Katter \[2021\] NSWCA 273](#)

APPEALS – Leave to appeal – Whether leave required – Interlocutory decisions – Setting aside of examination orders – Decision had effect of finally disposing of proceedings – Evident merit to appeal – Leave granted

[Mohareb v State of New South Wales \[2021\] NSWCA 278](#)

APPEAL – application for leave – interlocutory decisions of District Court – decisions to refuse amendments, to strike out certain paragraphs and to refuse to join new defendants – insufficient prospects of success to warrant grant of leave – application dismissed

[Murray Darling Basin Authority v Doyle’s Farm Produce Pty Ltd \[2021\] NSWCA 191](#)

PROCEDURE – interlocutory appeal from decision striking out paragraphs of defence – decision based on whether defendant was a “public or other authority” for purpose of Part 5 of Civil Liability Act 2002 (NSW) – appropriateness of determining question on strike out application or by way of separate question – directions made for formulation and determination of separate question

[PL Town Hall Pty Ltd v The Trust Company Ltd \[2021\] NSWCA 188](#)

APPEALS - leave to appeal - interlocutory orders - challenge to terms of interlocutory regime permitting tenant to recover goods from premises after conclusion of lease - pending proceedings seeking final relief - whether utility in grant of leave - whether tenant had failed to comply with earlier regimes - leave refused

[Rahman v Al-Maharmeh \[2021\] NSWCA 31](#)

APPEALS – Leave to appeal – Interlocutory decision disposing of appellant’s claim – Whether error resulting in injustice established – Leave granted

[Singh v Khan \[2021\] NSWCA 281](#)

APPEALS – Leave to appeal – Whether leave required from declaratory orders – Whether declarations can be interlocutory – Declarations were interlocutory for purposes of leave to appeal – Leave to appeal required – Appellant directed to file application for leave to appeal lest the appeal be dismissed

Jurisdiction

[Riki v Sphere Healthcare Pty Ltd \[2021\] NSWCA 276](#)

APPEALS – Jurisdiction of appellate court – Court of Appeal – Discretion to exercise jurisdiction – Appeal from District Court Judicial Registrar – Assignment to Supreme Court – Where no submissions by applicant in support of matter remaining in Court of Appeal – Remitted to Equity Division Corporations List

New point or issue raised on appeal

[Cappello v Hammond & Simonds NSW Pty Ltd \[2021\] NSWCA 57](#)

CONTRACT – cost plus contract for building work – claim in debt following non-payment of final invoice – belated submission that condition precedent requiring provision of details of cost of building works accompany builder's invoice not satisfied – submission not made to trial judge – whether point available on appeal

[McInnes v Rheem Australia Pty Limited \[2021\] NSWCA 89](#)

APPEALS – new point on appeal – where applicant for leave sought to raise new and different costs application on appeal – inimical to the interests of justice to allow new argument

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

APPEALS – Point not taken below – Conduct of trial – Existence of partnership assets not referred to in submissions below nor primary judgment but was in evidence and articulated in affidavit of solicitor – Raised in submissions on appeal and not contested by respondent – Radical effect upon outcome – Permissible to consider on appeal

[Musa v Alzreaiawi \[2021\] NSWCA 12](#)

APPEAL – new point or issue raised on appeal not taken at trial – where neither party called attesting witness of transfer form – where allegation transferor's signature forged – where

appellant sought a *Jones v Dunkel* inference on appeal that the missing witness' evidence would not have assisted the respondent – whether evidence could have been given which possibly could have answered the new point

Permanent stay of proceedings

[Fordyce v Leung in her capacity as Executrix of the Estate of the late Robert Ho \[2021\] NSWCA 262](#)

CIVIL PROCEDURE — stay of proceedings — where interim certificate of costs assessor treated as judgment upon filing in District Court under *Legal Profession Act 2004* (NSW), s 368(5) — where applicant's appeal to the District Court against decision of costs assessor remains afoot — where applicant seeks leave to appeal against District Court's refusal to set aside judgment — application for stay of deemed judgment, District Court appeal proceedings and the assessment process — whether appropriate to grant interim stays in the circumstances

[Inghams Enterprises Pty Ltd v Hannigan \[2021\] NSWCA 309](#)

APPEALS – leave to appeal – where application for permanent stay of proceedings dismissed – *Anshun* estoppel pleaded as defence in second proceeding by respondent claiming damages for breach of contract – first proceeding sought declaratory relief as to existence of contract and whether validly terminated by applicant – delay by applicant caused prejudice to respondent – no interim stay sought pending leave application – whether reasonably clear injustice going beyond something that is merely arguable

[Joshan v Pizza Pan Group Pty Ltd \[2021\] NSWCA 219](#)

CIVIL PROCEDURE – stay of proceedings – under the *Service and Execution of Process Act 1992* (Cth) – where District Court of New South Wales was court of issue – whether South Australian court was “the appropriate court” to determine all the matters in dispute between the parties – where the identification of all the matters in issue between the parties is a prerequisite to resolving the question of what is “the appropriate court”

Review of order of single judge of appeal

[Hassan v Sydney Local Health District \(No 2\) \[2021\] NSWCA 122](#)

APPEALS – procedure – Court of Appeal – motion seeking review of a decision of the Court dismissing application to review decision of a single judge – where suggestion that not all of the evidence or submissions had been considered by the reviewing court – where evidence and submissions voluminous, unstructured and discursive – extent of obligation to consider

and address

[Hassan v Sydney Local Health District \(No 5\) \[2021\] NSWCA 197](#)

CIVIL PROCEDURE – Court of Appeal – notice of motion – application for review of decision of single judge – no error shown – application dismissed – *Supreme Court Act 1970 (NSW)*, s 46(4)

Right of appeal

[Great Northern Developments Pty Ltd v Lane \[2021\] NSWCA 150](#)

APPEALS – right of appeal – scope of right – excess or lack of jurisdiction below – jurisdiction of the District Court – where there is a common law cause of action for money had and received

APPEALS – right of appeal – scope of right – excess or lack of jurisdiction below – jurisdiction of the District Court – whether proceeding is for “relief against fraud or mistake” – District Court Act 1973 (NSW), s 134

Show cause hearing

[Hassan v Sydney Local Health District \[2021\] NSWCA 97](#)

CIVIL PROCEDURE – Court of Appeal – Show cause hearing – Failure to file written submissions – Stay of hearing – Where no procedural unfairness in setting down hearing – Where no medical grounds for stay established – Where pendency of other motions by applicant, including applications to issue subpoenas and to reopen previous appeal, no reason for not preparing submissions – Stay refused – Where consistent failure to comply with directions – Where no sufficient reason for failure to file submissions – Self-executing order for dismissal of appeal if submissions not filed within one month

Statutory threshold to bring an appeal

[Clarke v Nursing and Midwifery Council New South Wales \[2021\] NSWCA 86](#)

APPEALS – application for leave – amount in issue less than threshold of \$100,000 – where dismissal of defamation proceedings involving two matters complained of – where no issue of principle or question of general importance – whether applicant demonstrated an injustice which is more than merely arguable – where likely costs of any appeal disproportionate to the small amount in issue

[Harris v State of New South Wales \[2021\] NSWCA 208](#)

APPEALS – Leave to appeal – From final order dismissing false imprisonment claim – Amount in issue below \$100,000 threshold – Insufficient prospects of success – Leave refused

[McEvoy v Wagglens Pty Ltd \[2021\] NSWCA 104](#)

APPEAL – application for leave to appeal – no issue of principle or question of public importance identified – where amount in issue substantially less than statutory threshold pursuant to s 101(2)(r) of the *Supreme Court Act 1970* (NSW)

[Sara Stockham Pty Ltd v WLD Practice Holdings Pty Ltd \[2021\] NSWCA 51](#)

APPEAL - leave - cross-claim dismissed following answers to separate questions - whether appeal as of right - requirement to show matter at issue to value of \$100,000

[Sidoti v Hardy \[2021\] NSWCA 105](#)

APPEALS – Leave to appeal – Whether leave required – Monetary threshold – Whether threshold denotes value of whole parcel of land or disputed portion only – Where questions of principle and public importance as to Torrens system also raised – Leave granted

Summary dismissal of proceedings

[CBRE \(V\) Pty Limited v Trilogy Funds Management Limited \[2021\] NSWCA 316](#)

CIVIL PROCEDURE – summary dismissal of proceedings – abuse of process – separate proceedings brought by different plaintiffs against same defendant – overlapping factual and legal issues – judgment delivered in first proceedings – application for leave to appeal against primary judge’s refusal to summarily dismiss second proceedings – actions of plaintiff in second proceedings not unreasonable – absence of any decisive overriding consideration of public interest – no abuse of process in second proceedings

[Wei Fan v South Eastern Local Health District \[2021\] NSWCA 36](#)

APPEALS – leave to appeal – where primary judge summarily dismissed originating process – whether originating process subject to cause of action estoppel

Supervisory jurisdiction

[Dacich v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 275](#)

APPEAL AND REVIEW – supervisory jurisdiction – review of judgment of District Court on appeal from Local Court – refusal to reopen sentence appeal – jurisdictional error – failure to vary sentence to take account of error in calculation of earlier partly concurrent sentence

[Hariz v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 264](#)

APPEAL AND REVIEW – Court of Appeal – supervisory jurisdiction – review of costs order made by District Court on appeal from Local Court – order in favour of successful appellant – review as to quantum – grounds – failure to take account of evidence/submissions – procedural unfairness in ordering costs motion to reopen

[Huang v Nazaran \[2021\] NSWCA 243](#)

JUDGMENTS AND ORDERS – supervisory jurisdiction – judicial review – application proceeding in Local Court special jurisdiction dismissed – where appeal to District Court under *Local Court Act 2007* (NSW), s 70(1) dismissed for lack of jurisdiction – whether jurisdictional error in dismissing appeal

[Huynh v Attorney General \(NSW\) \[2021\] NSWCA 297](#)

COURTS AND JUDGES – supervisory jurisdiction – post-appeal application to Supreme Court for inquiry into conviction under Pt 7, Div 3 of the *Crimes (Appeal and Review) Act 2001* (NSW) – power to consider application conferred on judge authorised by Chief Justice – power not conferred on Supreme Court – judge acting as *persona designata*

COURTS AND JUDGES – supervisory jurisdiction – post-appeal application to Supreme Court for inquiry into conviction – conviction for breach of a law of the Commonwealth – whether State Act applies of its own force – whether State Act picked up and applied as Commonwealth law – operation of s 68 of *Judiciary Act 1903* (Cth) where part only of State law ancillary to exercise of judicial power

[McNab v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 298](#)

COURTS AND JUDGES – Supreme Court – supervisory jurisdiction – District Court – jurisdictional error – appeal to District Court from conviction in Local Court – complainant not called as witness on appeal – District Court judge had regard to magistrate’s credibility findings – whether jurisdictional error by District Court

COURTS AND JUDGES – Supreme Court – Supervisory jurisdiction – District Court – jurisdictional error – applicant convicted in Local Court – conviction appeal to District Court – onus of proof on prosecutor to establish guilt beyond reasonable doubt – whether appellant required to establish factual, legal or discretionary error by magistrate – whether requirement that appellant demonstrate error reverses onus of proof – *Crimes (Appeal and Review) Act 2001* (NSW) s 18

5. Associations and Clubs

Rights, duties and liabilities of members

[Australian Federation of Islamic Councils Inc v United Muslims of New South Wales Inc \[2021\] NSWCA 311](#)

ASSOCIATIONS AND CLUBS – rights, duties and liabilities of members – committees – association constitutions – whether an unincorporated association was capable of being a State Council under the AFIC Constitution – where the unincorporated association was a group of individuals

ASSOCIATIONS AND CLUBS – rights, duties and liabilities of members – election of members – association constitutions – whether an elected person was duly appointed as delegate of the State Council under the AFIC Constitution

Validity of meetings

[Australian Federation of Islamic Councils Inc v United Muslims of New South Wales Inc \[2021\] NSWCA 311](#)

ASSOCIATIONS AND CLUBS – meetings – validity – association constitutions – whether UMNSW was removed as the State Council – whether the meeting at which the resolution removing UMNSW as State Council was properly convened

ASSOCIATIONS AND CLUBS – meetings – validity – association constitutions – whether UMNSW was replaced as the State Council by an elected committee of individuals

Voluntary Association

[Lianos v Order of AHEPA NSW Inc \(No 4\) \[2021\] NSWCA 159](#)

VOLUNTARY ASSOCIATIONS — unincorporated and incorporated associations — effect of incorporation — relationship between unincorporated and incorporated associations — complex structure of incorporated and unincorporated associations on local, state and national levels — incorporation of a unit that was subordinate to an unincorporated association — construction of rules and constitution

6. Banking & Finance

Guarantee and Indemnity

[Hopper v D J Sincock Pty Ltd \[2021\] NSWCA 305](#)

GUARANTEE AND INDEMNITY – Guarantor – Right to indemnity – Refinance agreement entered into by corporate agent of partnership comprised of three companies – Respective directors as guarantors – One partner seeking to leave the partnership – Corporate agent defaults – Settlement negotiated by one guarantor – No express right of indemnity of guarantors – Whether implied contractual right of indemnity inferable – Whether principal debtor requested guarantors to give guarantee – Whether request inferable from circumstances of case – Majority of directors of corporate agent and majority of partners in partnership aware guarantee would be provided and acquiesced to such a course – Commercial circumstances evinced request for guarantee so business could continue to operate – Guarantee given in same document that established debt obligation – Express request for guarantee by creditor irrelevant – Right to indemnity established – Appeal allowed

GUARANTEE AND INDEMNITY – Indemnities – Construction – Whether right to indemnity excluded by inconsistent express or implied agreement or otherwise estopped – Assurances by one partner to departing partner regarding freedom from liability not made with knowledge or authority of third partner – Departing partner did not consider concluded agreement to have been reached – No inconsistent agreement – No estoppel

GUARANTEE AND INDEMNITY – Guarantor – Rights against co-guarantors – Contribution before payment made – Partners liable to contribute in proportion to their interests in partnership – Declaratory relief granted

Unconscionable conduct

[MacDonald v Yakiti Pty Ltd & Ors \[2021\] NSWCA 114](#)

UNCONSCIONABLE CONDUCT — Where appellant excluded from negotiations after admission to hospital — *Australian Securities and Investments Commission Act 2001* (Cth), ss 12CA, 12CB — Whether respondents took unconscientious advantage of the appellant's disabling condition — *Australian Securities and Investments Commission Act 2001* (Cth), s 12GM(7) — Whether appellant suffered any compensable loss

7. Building & Construction

Claim for defective work

[Cappello v Hammond & Simonds NSW Pty Ltd \[2021\] NSWCA 57](#)

CONTRACT – building contract – claim for defective work – owner directed re-pouring of lowered slab – whether that work was a consequence of incorrectly built ceiling – whether owner entitled to damages

Contracts

[Lichaa v Boutros \[2021\] NSWCA 322](#)

BUILDING AND CONSTRUCTION — Contract — Termination — Repudiation – the Respondent, the builder, was shut out from site after repudiatory conduct by the Appellant, the owner – whether the owner repudiated the contract.

BUILDING AND CONSTRUCTION — Contract — Damages — Defects – relevance of repudiation to claims for damages for defects – whether repudiation by the owner not relevant – Appellant had accrued rights in respect of work carried out prior to determination of the contract.

BUILDING AND CONSTRUCTION — Contract — Damages — Defects – engagement of second builder to complete work of the Respondent including repair of defects of Respondent not exculpatory of Respondent and not relevant to the loss claimed in respect of defects solely the result of work performed by the Respondent – whether owner had accepted the defective work.

BUILDING AND CONSTRUCTION — Contract — Damages – proof of loss – adequacy of evidence supporting loss – where failure to mitigate damages not pleaded – whether evidence from the Appellant’s expert that would enable the Appellant’s loss to be calculated albeit on the basis of demolition of the building.

[Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd \(No 2\) \[2021\] NSWCA 93](#)

CONTRACTS – breach of contract – consequences of breach – right to damages – estoppel – promissory estoppel – whether it was unconscionable for the principal to resist payment for the performance of certain works – where the principal was positively encouraging the contractor to complete outstanding works – where such encouragement followed the principal’s purported departure from the assumption that it had approved these works

BUILDING AND CONSTRUCTION – contract – termination – quantum meruit – whether the contract operated to generate release and waiver of subsequent claims for payment by the contractor – where the contractor had suffered irreversible detriment by incurring liability to pay for materials prior to the principal’s insistence upon strict adherence to the contract

BUILDING AND CONSTRUCTION – contract – variation – implied promise to pay – whether the works constituted “variations” as defined in the contract – where the principal requested that the contractor supply materials that it had originally insisted upon supplying itself – where written approval was sought by the contractor in respect of all other variation works

Damages

[Cappello v Hammond & Simonds NSW Pty Ltd \[2021\] NSWCA 57](#)

CONTRACT – building contract – claim for defective work – owner directed re-pouring of lowered slab – whether that work was a consequence of incorrectly built ceiling – whether owner entitled to damages

CONTRACT – quantification of damages – building contract – delay in performance – whether owner entitled to damages for diminution in market value of residential house – whether owner entitled to general damages for limited use and loss of amenity while building works continued

[Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd \(No 2\) \[2021\] NSWCA 93](#)

BUILDING AND CONSTRUCTION – contract – damages – defects – whether the contractor was responsible for defects in materials supplied by a third party – where the relevant contractual warranty was confined to “works required to be performed by the contractor”

Expert determination clause in contract

[Lahey Constructions Pty Ltd v The State of New South Wales \[2021\] NSWCA 69](#)

CONTRACT – building and construction contracts – interpretation – expert determination clause – whether expert determination is final and binding – where parties’ precluded from commencing litigation following expert determination unless value of the determination exceeded a threshold amount – where value of the determination to be calculated without having regard to amounts paid under the *Building and Construction Industry Security of Payment Act 1999* (NSW)

Payment claim

[Joye Group Pty Ltd v Cemco Projects Pty Ltd \[2021\] NSWCA 211](#)

BUILDING AND CONSTRUCTION – progress payment claim – payment schedule – email refusing payment until work completed – failure to say why payment withheld – other documents not incorporated – use of contextual material – *Building and Construction Industry Security of Payment Act 1999* (NSW), s 14

[Maaz v Fullerton Property Pty Ltd \[2021\] NSWCA 79](#)

BUILDING AND CONSTRUCTION – payment claim by builder – false statutory declaration in support of payment claim – statement by builder that all subcontractors paid – claim paid by principal – principal liable to unpaid subcontractors – *Contracts Debts Act 1997* (NSW), s 5 – proceedings against builder for moneys paid by principal directly to subcontractors

8. Civil procedure

Additional evidence on appeal

[Arambatzis v Foundas; Foundas v Wengel \[2021\] NSWCA 78](#)

JUDGMENTS AND ORDERS – Court of Appeal – Stay of execution of writ for possession – Where fresh evidence with indicia of authenticity raising serious question of miscarriage of justice in decision below produced at extremely late stage – Where interests of justice require exploration of evidence before taking irrevocable step of ejection – Stay granted

CIVIL PROCEDURE – Representation – Unrepresented litigant – Pro bono referral – Referral made to allow for legal assistance in exploration of fresh evidence

[Lianos v Order of AHEPA NSW Inc \(No 4\) \[2021\] NSWCA 159](#)

APPEALS — procedure — application to reopen for adducing further evidence — special grounds — curing factual misapprehension — exercise of court's discretion — variation of orders to cure misapprehension

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

APPEALS – Further evidence – Evidence not available at hearing – Evidence of transcripts, orders, and reasons of English courts – Motion not required for Court to have regard to such evidence – No reason to permit other further evidence identified in motion – Motion dismissed with costs

Adjournment

[Ah Sam v Mortimer \[2021\] NSWCA 327](#)

CIVIL PROCEDURE – Hearings – Adjournment – Appellant received material from respondent shortly before taking of evidence – Evidence had been served long before – Submissions did not commence for another three weeks – Ample time to respond – No injustice identified

Application for expedition

[GR v Secretary, Department of Communities and Justice \[2021\] NSWCA 52](#)

CIVIL PROCEDURE — Court of Appeal — leave to appeal — application for concurrent hearing of leave application and appeal — application for expedited hearing — no issue of principle

Application for leave to appeal

[Alexakis v Health Care Complaints Commission \[2021\] NSWCA 217](#)

APPEALS – application for leave to appeal – practice and procedure – refusal of stay – separate civil proceedings in Supreme Court – common factual basis – differing issues – findings in one not admissible in the other – no prejudice demonstrated

[Amirbeaggi v Matrix Group Co Pty Ltd \[2021\] NSWCA 21](#)

APPEALS – leave to appeal – where primary judge refused leave to appeal to raise argument not dealt with by magistrate – whether argument made to magistrate – no error of primary judge in concluding not made

[Bowers v Judicial Commission of NSW \(No 1\) \[2021\] NSWCA 323](#)

APPEALS – leave to appeal – challenge to dismissal of summons seeking relief against the Judicial Commission – no arguable reason advanced for concluding that primary judgment erroneous – no prospects of success on an appeal – leave to appeal refused

[Bowers v Judicial Commission of NSW \(No 2\) \[2021\] NSWCA 324](#)

APPEALS – leave to appeal – challenge to dismissal of summons seeking relief against the Judicial Commission – no arguable reason advanced for concluding that primary judgment erroneous – no prospects of success on an appeal – leave to appeal refused

[Bowers v The Law Society of New South Wales \[2021\] NSWCA 118](#)

CIVIL PROCEDURE – Court of Appeal – leave to appeal – notice to produce – no issue of principle

[Bowers v The Law Society of New South Wales \[2021\] NSWCA 270](#)

CIVIL PROCEDURE — Court of Appeal — Leave to appeal — Final or interlocutory order — Appeal from determination concerning constructive refusal of application to vary legal practising certificate — where practising certificate in question since expired — No utility in granting leave

[Choi v Commissioner of Police, New South Wales Police \[2021\] NSWCA 113](#)

APPEALS — Leave to appeal — Application arising from decision of the Appeal Panel of the

NSW Civil and Administrative Tribunal — Appeal confined to a question of law — No question of law identified such as to warrant a grant of leave

[Clarke v Herrick \[2021\] NSWCA 102](#)

APPEALS – leave to appeal – applicant alleged assaults and batteries perpetrated on her by respondents – primary judge rejected applicant’s evidence and dismissed claims – need for applicant to show primary judge’s findings glaringly improbable or contrary to compelling inferences – no arguable basis for concluding applicant had a prospect of success on appeal if leave were granted

[Clarke v Hicksons Lawyers \[2021\] NSWCA 100](#)

APPEALS – application for leave – applicant brought proceedings against respondent in District Court claiming damages for alleged misconduct in other proceedings – where respondent acted for parties in hostile civil litigation involving the applicant – proceedings summarily dismissed as disclosing no reasonable cause of action – where no issue of principle or question of general importance raised by appeal – where applicant not demonstrated an injustice which is more than merely arguable – leave refused

[Clarke v Nursing and Midwifery Council New South Wales \[2021\] NSWCA 86](#)

APPEALS – application for leave – amount in issue less than threshold of \$100,000 – where dismissal of defamation proceedings involving two matters complained of – where no issue of principle or question of general importance – whether applicant demonstrated an injustice which is more than merely arguable – where likely costs of any appeal disproportionate to the small amount in issue

[Collier v Attorney General for New South Wales \[2021\] NSWCA 16](#)

APPEAL – application for leave – challenge to interlocutory ruling on access to documents – misconceived allegation of bias – unsubstantiated allegations of perjury by solicitor – delay in giving judgment – no demonstration of prejudice – no arguable ground of error identified

[Dubow v Mid-Western Regional Council \(No 2\) \[2021\] NSWCA 223](#)

PRACTICE AND PROCEDURE – application for leave to appeal – stay of enforcement of costs order – referral for pro bono assistance – motion dismissed

[Dubow v Mid-Western Regional Council \(No 3\) \[2021\] NSWCA 279](#)

APPEAL – application for leave to appeal – judicial review of conduct of local council – whether local council an impounding authority – powers of council officers to impound stock straying on public road – whether alpacas are stock or animals

[Jimenez v Watson \[2021\] NSWCA 55](#)

APPEALS – Leave to appeal – No arguable case – Solicitors – Advocate’s immunity

[JK \(a pseudonym\) v St Vincent’s Hospital Sydney Limited \[2021\] NSWCA 7](#)

APPEALS – application for leave to appeal – no issue of principle, question of public importance or a reasonably clear injustice

[Kassam v Hazzard; Henry v Hazzard \[2021\] NSWCA 299](#)

APPEALS – leave to appeal – principles governing – consequences for the parties – where the validity of the Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW), the Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 (NSW) and the Public Health (COVID-19 Aged Care Facilities) Order 2021 (NSW) was sought to be challenged – where two of those orders had been repealed and ceased to operate as at the hearing of the appeal and the third was to expire imminently – where the reasons of the primary judge disclosed no error of principle – where the proper construction of s 7 of the *Public Health Act 2010* (NSW) raises a matter of public importance in the midst of an ongoing pandemic – whether there is any utility in granting leave to appeal to review orders already repealed or imminently to expire

CIVIL PROCEDURE – Court of Appeal – leave to appeal – concurrent hearing of leave application and appeal – where constitutional arguments sought to be raised – where no arguable case was advanced – where the reasons of the primary judge disclosed no error of principle – where the raising of constitutional arguments does not give a case elevated status when considering a grant of leave to appeal – whether leave to be granted in circumstances of limited utility

[Khanna v Allianz Australia Insurance Limited \[2021\] NSWCA 231](#)

APPEAL – application for leave to appeal – where final orders entered by consent – applicant claiming not to have understood effect of orders for medical reasons – whether orders liable to be set aside on that basis

[Makowska v St George Community Housing Ltd \[2021\] NSWCA 249](#)

APPEALS — leave to appeal — no issue of principle, question of general public importance, or injustice — leave refuse

[Mao v B T Funds Management Limited & Ors \[2021\] NSWCA 295](#)

APPEALS — Leave to appeal — where earlier proceedings brought by applicant were discontinued by a tutor — where primary judge dismissed notice seeking a declaration that discontinuance was void — no arguable basis for challenging primary judge's orders

[McEvoy v Wagglens Pty Ltd \[2021\] NSWCA 104](#)

APPEAL – application for leave to appeal – no issue of principle or question of public importance identified – where amount in issue substantially less than statutory threshold pursuant to s 101(2)(r) of the *Supreme Court Act 1970* (NSW)

[McInnes v Rheem Australia Pty Limited \[2021\] NSWCA 89](#)

APPEALS – leave to appeal – practice and procedure – challenge to costs order – no question of principle or general public importance – whether an injustice which is more than merely arguable – whether failure to consider material consideration – where reasonableness of applicant's conduct of the proceedings not relied upon below – leave to appeal refused

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

APPEALS – Leave to appeal – Whether leave required – Interlocutory decisions – Appeal from permanent stay – No final determination of rights and obligations of parties – Distinction from final resolution by way of estoppel arising from earlier proceedings – Leave required – Decision nevertheless finally determined ability of appellant to litigate – Appeal heard concurrently and in full – Appeal meritorious – Leave to appeal granted

[Mohareb v Kelso \[2021\] NSWCA 103](#)

APPEALS – leave to appeal – applicant's notice of motion dismissed by Registrar – whether primary judge in error in refusing to set aside that dismissal – whether applicant's amended summons was taken to be dismissed by operation of the *Vexatious Proceedings Act* – relevant vexatious proceedings order later set aside on appeal – arguable basis for challenging those orders demonstrated – leave to appeal granted on a limited basis

[Mohareb v Kelso \(No 4\) \[2021\] NSWCA 336](#)

CIVIL PROCEDURE – application to expand scope of leave to appeal after final hearing and determination of appeal – repeated applications

[Mohareb v Palmer \(No 3\) \[2021\] NSWCA 39](#)

APPEAL – application for leave to appeal – applicant subject to vexatious proceedings order – whether leave required to file summons seeking leave to challenge order – appeal heard – whether leave required to file notice of motion seeking to vary orders

[Mohareb v State of New South Wales \[2021\] NSWCA 278](#)

APPEAL – application for leave – interlocutory decisions of District Court – decisions to refuse amendments, to strike out certain paragraphs and to refuse to join new defendants – insufficient prospects of success to warrant grant of leave – application dismissed

[Mudge v Business Finance Pty Ltd \(Receiver and Manager Appointed\) \[2021\] NSWCA 250](#)

APPEALS – application for leave – where mortgagee brought proceeding for removal of caveats lodged by guarantor/mortgagor against two adjoining properties – interlocutory order made for withdrawal of caveats – sale of properties completed – contention that sale of properties unauthorised – whether leave should be granted – whether injustice which is reasonably clear – leave refused

[Mulligan v The Nominal Defendant \[2021\] NSWCA 222](#)

APPEALS – application for leave to appeal – proposed appeal has no significant prospect of success – no issue of principle – no question of general public importance

[Rinehart v Rinehart \[2021\] NSWCA 233](#)

APPEALS – application for leave to appeal – proposed appeal has no significant prospect of success – no important issue of principle – no question of general public importance

[Sebie v Pham \(No 3\) \[2021\] NSWCA 277](#)

APPEALS – Leave to appeal – From orders for payment out from funds held in Court – Only other party with arguable claim to funds not permitted by Court to be re-joined as an applicant – Grant of leave would undermine Court's unanimous decision to refuse re-joinder – Significant obstacles and uncertainty attending to claim – Court concerned by potential undisclosed interest of first applicant – First and second respondents entitled to final resolution – Orders appealed from are discretionary – Leave refused

APPEALS – Leave to appeal – From various other decisions dating back to 2017 – Application well out of time – No explanation for delay – Issues known to applicant and thus ought to have been raised much earlier – Rights of third parties have intervened – No errors demonstrated – Leave refused

[Singh v Hicks and Nissan \[2021\] NSWCA 80](#)

APPEALS – application for leave – applicant convicted in Local Court of offences contrary to *Inclosed Lands Protection Act 1901* (NSW) – District Court dismissed conviction and sentence appeal and confirmed orders in Local Court – where applicant refused leave to appeal to Supreme Court from interlocutory orders made in Local Court – no issue of principle or question of general importance – whether Court should extend time for filing of summons – no utility in an appeal where orders of District Court stand unreversed

[Tanious v NSW Land & Housing Corporation \[2021\] NSWCA 254](#)

ADMINISTRATIVE LAW – application for leave to appeal from refusal of leave to appeal from NCAT – leave refused

[Will v Brighton \(No 2\) \[2021\] NSWCA 8](#)

APPEAL – application for leave to appeal – orders – where grant of application for leave to appeal conditioned on applicant agreeing not to press for an order setting aside the quashing of the conviction of the respondent – where resulting orders of Court of Appeal set aside an order allowing an appeal against conviction but also set aside an order dismissing charges under s 530(1) of the *Crimes Act 1900* (NSW) and remit the matter to the Local Court for determination in accordance with law in circumstances where no express finding had been made in relation to the mental element of the charges preferred

[Woodman v Australian and New Zealand Banking Group Ltd \[2021\] NSWCA 230](#)

APPEALS — leave to appeal — summary judgment where amendment to defence refused — opportunity to advance further evidence in support of amended defence — limited grant of appeal

[Young v Racing NSW \[2021\] NSWCA 241](#)

APPEALS – application for leave to appeal – proposed appeal has no prospect of success

[Young v Richmond Valley Council \[2021\] NSWCA 255](#)

APPEALS — Leave to appeal — where applicant seeks leave to appeal from summary dismissal — where applicant had brought proceedings for recovery of land against party other than the registered proprietor — where no viable claim

Application for amendment to reasons

[Gorman v McKnight \(No 2\) \[2021\] NSWCA 33](#)

CIVIL PROCEDURE – application for amendment to reasons in Court’s inherent jurisdiction – where reasons extracted the transcript of a recording authorised under the *Surveillance Devices Act 2007* (NSW) and tendered in open court – where transcript not subject to a non-publication order or suppression order – whether publication of transcript contrary to s 40 of the *Surveillance Devices Act* – application dismissed

Application for injunction pending appeal

[North Parramatta Residents' Action Group Inc v Infrastructure New South Wales \[2021\] NSWCA 128](#)

APPEAL – injunction – application for injunction to preserve property the subject of the appeal – expedition granted – interim injunction granted – whether conditions should be imposed limiting the effect of the injunction – public interest underlying the litigation – merit of appeal – prejudice to respondent – appeal to be heard in seven days

[Seek Justice Pty Ltd v Blue Mountains City Council \[2021\] NSWCA 87](#)

APPEALS – procedure – informal urgent application for injunction pending appeal – applicant applied to stop trail running event in the Blue Mountains from proceeding the next day – primary judge dealt thoroughly with circumstances of proposed event and carefully weighed matters going to the balance of convenience – applicant did not show any reason for a different view to be taken than that taken by the primary judge

Application for stay of hearing and orders

[Ah Sam v Mortimer \[2021\] NSWCA 141](#)

APPEALS – procedure – stay pending appeal

[Bassel Abdul Rahman v Health Care Complaints Commission of NSW \[2021\] NSWCA 127](#)

Application for stay of tribunal’s orders cancelling medical registration or for restorative interlocutory order — no question of principle

[Di Liristi v Matautia Developments Pty Ltd \[2021\] NSWCA 163](#)

CIVIL PROCEDURE – Court of Appeal – Stay pending appeal – Judgment for monetary sum – Orders transferring proceedings for possession to NCAT – Whether arguable grounds of appeal – Whether orders already implemented amenable to stay – Whether failure to grant stay would render appeal nugatory – Monetary judgment stayed – Anti-suit injunction granted restraining prosecution of proceedings in NCAT – Conditional upon undertakings as to damages and expedition, and provision of security

[Dubow v Mid-Western Regional Council \[2021\] NSWCA 175](#)

PRACTICE AND PROCEDURE – appeal – stay pending hearing of application for leave to appeal – gross costs order – stay of enforcement

[Gautam v Health Care Complaints Commission \(No 1\) \[2021\] NSWCA 1](#)

PRACTICE AND PROCEDURE – appeal – stay – medical practitioner – finding of professional misconduct – order suspending registration – period of suspension likely to expire before appeal determined – appeal reasonably arguable – misconduct involved single incident three years before order made – order the suspension not commence for 30 days – no evidence of immediate risk to patients or parents

[Muriniti v Kalil \[2021\] NSWCA 81](#)

JUDGMENTS AND ORDERS – Court of Appeal – Stay of District Court costs orders – Where stay would halt costs assessment process – Where restitution available for costs incurred during assessment process – Where process well-advanced – Stay refused

JUDGMENTS AND ORDERS – Court of Appeal – Stay of anticipated costs assessment award – Where enforcement likely to cause considerable inconvenience and financial stress – Where risk of non-recoverability resolved by undertaking – Where no evidence of hardship – Stay granted

[RH v Secretary, Department of Communities & Justice \[2021\] NSWCA 101](#)

CIVIL PROCEDURE — Stay of proceedings — Inherent power — Application for stay of proceedings in Children’s Court pending determination of summons seeking leave to appeal from summary dismissal of proceedings in the Supreme Court invoking *parens patriae* jurisdiction — Applicable test

[Scrivener v Cappello \[2021\] NSWCA 239](#)

APPEALS – procedure – application for stay of judgment pending appeal – stay refused on the condition that the first and second respondents give certain undertakings

[Sebie v Pham \[2021\] NSWCA 115](#)

CIVIL PROCEDURE – Court of Appeal – Stay of orders for payment out of funds in Court – Where funds represent purchase money of real property – Whether judgment creditor entitled to payment out orders – Where outstanding claim to funds by second applicant – Where such claim not without merits – Stay granted – Stay conditional upon formal undertakings as to damages by applicants

CIVIL PROCEDURE – Court of Appeal – Stay of costs orders – Where application out of time – Where no sufficient prospects of success demonstrated – Stay refused

[Sebie v Pham \(No 4\) \[2021\] NSWCA 326](#)

CIVIL PROCEDURE – Court of Appeal – application for stay of orders pending application for special leave to appeal to High Court – where orders made in underlying proceedings for payment out of funds held in court – where leave to appeal against those payment orders and earlier orders refused by majority of this Court – whether substantial prospect that special leave will be granted – application dismissed

[Secretary, Department of Communities and Justice v KH \[2021\] NSWCA 308](#)

APPEALS – procedure – stay pending appeal – District Court decision on appeal in child care and protection proceedings – District Court found realistic possibility of restoration of child to mother and ordered preparation of amended care plan – Secretary seeking judicial review of District Court decision in Court of Appeal – motion by Secretary to stay District Court orders pending determination of judicial review application – stay granted

[Trentelman v The Owners – Strata Plan No 76700 \[2021\] NSWCA 62](#)

PRACTICE - stay of execution pending appeal - appropriateness of interlocutory relief - appeal concedely reasonably arguable - whether appellant had established significantly greater prospect of success - balance of convenience - application for stay pending appeal refused

[Ulladulla Creative Images Pty Ltd v Tibbles \[2021\] NSWCA 200](#)

JUDGMENTS AND ORDERS – Court of Appeal – Stay of primary judgment – Appeal not unarguable – Appeal likely to be rendered nugatory without stay – Where judgment for portion of funds received from insurance payment – Disposition of funds unexplained by applicant – Indicia that appellant may be insolvent – Sums transferred from corporate appellant to director – Sums potentially recoverable by liquidator – Prejudice to respondents if potential appointment of liquidator deferred – Prejudice potentially mitigable by fixed and floating charge over assets of appellant and director – No such security offered – Stay refused

[Vitality Works Australia Pty Ltd v Yelda \[2021\] NSWCA 4](#)

CIVIL PROCEDURE – stay of proceedings – matter of practice and procedure – whether stay should be granted of Tribunal damages hearing

[Zhu v Wang \[2021\] NSWCA 149](#)

APPEALS – procedure – stay pending appeal

[Zhu v Wang \[2021\] NSWCA 265](#)

CIVIL PROCEDURE – stay of orders – application for stay pending application for special leave to appeal to High Court – where no application yet filed in High Court – where no evident prospects of success of obtaining special leave under *Judiciary Act 1903* (Cth), s 35A – where no offer by applicants to pay any part of judgments into court as a condition of a stay – whether applicant had accrued right to fee which could be set-off against judgment debts – whether orders should be stayed – whether exceptional circumstances established for grant of stay

Application for stay pending special leave to appeal to the High Court

[Super Vision Resources Ltd BVI Registered No 1810534 v AC Holdings Co Pty Ltd \(No 3\) \[2021\] NSWCA 70](#)

APPEALS – procedure – stay pending special leave to appeal to the High Court – where orders for payment of money to trustee in bankruptcy – where trustee in bankruptcy gave undertaking not to distribute or deal with any funds paid to him – whether stay necessary to preserve subject matter of appeal – whether costs of motion seeking stay should be “costs in the cause in the High Court”

[Zhu v Wang \[2021\] NSWCA 265](#)

CIVIL PROCEDURE – stay of orders – application for stay pending application for special leave to appeal to High Court – where no application yet filed in High Court – where no evident prospects of success of obtaining special leave under *Judiciary Act 1903* (Cth), s 35A – where no offer by applicants to pay any part of judgments into court as a condition of a stay – whether applicant had accrued right to fee which could be set-off against judgment debts – whether orders should be stayed – whether exceptional circumstances established for grant of stay

Application to reopen by non-party

[Lianos v Order of AHEPA NSW Inc \(No 4\) \[2021\] NSWCA 159](#)

APPEALS — procedure — application for joinder after appeal decision handed down — applicants interested in appeal who took no part in appeal — court’s power to preclude party from litigation without res judicata or issue estoppel — factors warranting

Application to set aside subpoena

[GR v Secretary, Department of Communities and Justice \[2021\] NSWCA 267](#)

CIVIL PROCEDURE - subpoenas - application to set aside - where production of material unduly burdensome and would not facilitate appeal

[Secretary of the Department of Planning, Industry and Environment v Blacktown City Council \[2021\] NSWCA 145](#)

CIVIL PROCEDURE – subpoenas – to produce documents or things – application to set aside – legitimate forensic purpose – test for determining the validity of a subpoena issued in civil proceedings – whether sufficient that the documents sought by a subpoena have “apparent relevance” to an issue in the proceedings – whether necessary to satisfy the court that the documents are likely materially to assist the case of the party issuing the subpoena – consideration of bases for setting aside subpoenas

CIVIL PROCEDURE – Subpoenas – Legitimate forensic purpose – origins of concept – converse of abuse of process – whether a party issuing a subpoena will lack a legitimate forensic purpose if unable to demonstrate that documents sought by subpoena likely to assist its case – legitimate forensic purpose may be presumed where documents sought have apparent relevance to matters in issue or are capable of assisting in cross examination

[Zong v Lin \[2021\] NSWCA 209](#)

CIVIL PROCEDURE – subpoenas – to produce documents – application to set aside – whether legitimate forensic purpose – whether subpoena irrelevant, too broad or issued for improper purpose – apparent relevance to application for security for costs – documents relating to appellants’ source of funds – application to set aside subpoena dismissed

Application to vacate hearing date

[Atanaskovic v Birketu Pty Ltd \(ACN 003 831 392\) \[2021\] NSWCA 11](#)

CIVIL PROCEDURE — hearings — adjournment – application to vacate hearing of an appeal listed for three days – where appellants’ Senior Counsel travelled to United Kingdom in November 2020 and unlikely to return to Australia given the Covid-19 pandemic –

assessment of the interests of justice where competing claims of prejudice – application refused

[Gibson v Director of Public Prosecutions \[2021\] NSWCA 176](#)

PRACTICE AND PROCEDURE – judicial review – refusal by District Court to state case to Court of Criminal Appeal – application to vacate hearing date – further charge pending in Local Court – stress – lack of medical evidence – no basis to delay hearing by several months

[Harris v Harris \[2021\] NSWCA 329](#)

CIVIL PROCEDURE – application to vacate hearing – where admissions by appellants of loan balances outstanding – appellants belatedly sought access to records held by provisional liquidator in aid of potential application to withdraw admissions – primary judge found appellants had access to relevant documents and delayed seeking and reviewing documents – whether appellants deprived of opportunity to review documents – whether error in discretionary decision refusing to vacate the hearing

Appointment of guardian ad litem

[Choi v NSW Ombudsman \[2021\] NSWCA 68](#)

PRACTICE AND PROCEDURE — appointment of *guardian ad litem* under s 45 of the *Civil and Administrative Tribunal Act 2013 (NSW)* — whether appointment could be delegated by Tribunal to the Secretary of the Department of Justice

[GR v Secretary, Department of Communities and Justice \[2021\] NSWCA 52](#)

CIVIL PROCEDURE — Court of Appeal — application to set aside order appointing guardian ad litem — no issue of principle

Bias

[Clarke v Herrick \[2021\] NSWCA 102](#)

COURTS AND JUDGES – bias – application for recusal – ground of apprehended bias – judge made adverse ruling against applicant in previous litigation – applicant unable to identify why that might cause a reasonable bystander to apprehend that the judge might not bring an impartial mind to the resolution of the issues – judge declined to recuse himself

[CM v Secretary, Department of Communities and Justice \[2021\] NSWCA 244](#)

COURTS AND JUDGES – application for recusal rejected by District Court judge – summons seeking judicial review of decision dismissed

[Mohareb v Kelso \[2021\] NSWCA 103](#)

COURTS AND JUDGES – bias – application for recusal – ground of apprehended bias – applicant unable to identify any reason why a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the issues arising on the application – judge declined to recuse herself

[Mohareb v Kelso \(No 2\) \[2021\] NSWCA 182](#)

COURTS AND JUDGES – bias – application for recusal – allegations of apprehended bias and actual bias against judges – applications rejected

[Mohareb v Kelso \(No 3\) \[2021\] NSWCA 213](#)

COURTS AND JUDGES – bias – grounds alleging actual bias and apprehended bias – repeated applications for recusal on substantially the same grounds – no basis for recusal

[Mohareb v Kelso \(No 4\) \[2021\] NSWCA 336](#)

COURTS AND JUDGES – bias – repeated applications for recusal on substantially the same grounds – no basis for recusal

[Polsen v Harrison \[2021\] NSWCA 23](#)

COURTS AND JUDGES – bias – application for recusal – application declined – judge commented on role of plaintiff's expert at conclave – comments made during preliminary discussion as to amended pleading – whether a fair-minded lay observer might think judge might have pre-judged credibility of witness

[Yenuga v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 293](#)

JUDICIAL REVIEW – Bias rule – Apprehended – Particular factual matter giving rise to alleged bias – Where primary judge contacted respondent seeking submissions in response to applicant's application – Applicant copied on email – No apprehension of bias

Cross-vesting

[Singh v Khan \[2021\] NSWCA 281](#)

CIVIL PROCEDURE – Court of Appeal – Objections to competency of appeal – Whether appeal from exercise of cross-vested jurisdiction and so lies only to Federal Court – Whether leave to appeal required

CIVIL PROCEDURE – Cross-vesting – Where appellant became bankrupt after commencing proceedings in Supreme Court – Whether a “matter arising under” the *Bankruptcy Act* – Distinction from exercise of jurisdiction in bankruptcy – Cross-vesting legislation not intended to require appeals from judgment in a matter arising under a Commonwealth Act to be instituted in federal Court where first instance court not exercising cross-vested jurisdiction – Primary judge was not exercising cross-vested jurisdiction – Cross-vesting legislation not engaged

Discontinuance of proceedings

[Dacich v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 275](#)

PROCEDURE – civil – discontinuance – notice given after hearing – leave requirement – dismissal – costs

Extension of time to commence appeal

[Australian Jade Mining Limited v Li \[2021\] NSWCA 251](#)

APPEALS – procedure – application to extend time for filing Notice of Appeal – no realistic prospect of success on appeal – no reasonable explanation for delay – extension of time refused and appeal dismissed

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

CIVIL PROCEDURE – Time – Extension of time – Motion by appellant seeking extension of time to comply with orders for provision of transcripts, orders, and reasons of English courts – Material of relevance – Material said to already have been in possession of solicitor – Material not responsive and ought to have been obtained prior to hearing – Extension granted but appellant to pay costs of motion

[Melhem v Katter \[2021\] NSWCA 273](#)

APPEALS – Procedure – Time limits – Extension of time – Where respondents on notice of intention to appeal prior to time elapsing – No prejudice identified – Extension granted

[Renshaw v New South Wales Lotteries Corporation Pty Ltd \[2021\] NSWCA 41](#)

APPEALS – Procedure – Time limits – Extension of time to appeal – Where appeal initially discontinued without satisfactory explanation – Where substance of appeal has no merit – Application refused

[Sebie v Pham \(No 3\) \[2021\] NSWCA 277](#)

APPEALS – Leave to appeal – From various other decisions dating back to 2017 – Application well out of time – No explanation for delay – Issues known to applicant and thus ought to have been raised much earlier – Rights of third parties have intervened – No errors demonstrated – Leave refused

Extent of obligation by Court to consider and address voluminous submissions

[Hassan v Sydney Local Health District \(No 2\) \[2021\] NSWCA 122](#)

APPEALS – procedure – Court of Appeal – motion seeking review of a decision of the Court dismissing application to review decision of a single judge – where suggestion that not all of the evidence or submissions had been considered by the reviewing court – where evidence and submissions voluminous, unstructured and discursive – extent of obligation to consider and address.

CIVIL PROCEDURE – Court of Appeal – application to review a decision of the Court – where application brought by way of a notice of motion – where suggestion that not all of the evidence or submissions had been considered by the reviewing court – where evidence and submissions voluminous, unstructured and discursive – extent of obligation to consider and address

Failure to file written submissions

[Hassan v Sydney Local Health District \[2021\] NSWCA 97](#)

CIVIL PROCEDURE – Court of Appeal – Show cause hearing – Failure to file written submissions – Stay of hearing – Where no procedural unfairness in setting down hearing – Where no medical grounds for stay established – Where pendency of other motions by applicant, including applications to issue subpoenas and to reopen previous appeal, no reason for not preparing submissions – Stay refused – Where consistent failure to comply with directions – Where no sufficient reason for failure to file submissions – Self-executing order for dismissal of appeal if submissions not filed within one month

Freezing orders

[Stockham v WLD Practice Holdings Pty Limited \[2021\] NSWCA 280](#)

APPEALS – procedure – freezing order – sufficient basis for order extending freezing order
– leave to appeal refused

Joinder

[AQC Dartbrook Management Pty Ltd v Minister for Planning and Public Spaces \[2021\] NSWCA 112](#)

PRACTICE AND PROCEDURE – joinder – appeal against refusal of application to modify development consent – parties agree on terms of a decision to dispose of appeal – intervenor raising jurisdictional issue that court has no power to so dispose of the appeal – source of power to join intervenor – whether s 8.15(2) *Environmental Planning and Assessment Act* available power for joinder – section 8.15(2) not an available power of joinder for this appeal - whether r 6.24 Uniform Civil Procedure Rules alternative source of power for joinder – whether joinder as a party necessary to determine all matters in dispute - whether power to amend modification application – whether error in exercise of discretion to join intervenor – whether joinder legally unreasonable

[Sebie v Pham \(No 2\) \[2021\] NSWCA 274](#)

CIVIL PROCEDURE – Parties – Joinder – Application to reinstate company as appellant after misconceived attempt to circumvent requirement of representation by joining director instead

Jurisdiction

[Sydney Seaplanes Pty Ltd v Page \[2021\] NSWCA 204](#)

CIVIL PROCEDURE – jurisdiction – declaration that court has no jurisdiction to decide claim – claim for death or injury – carriage by air – occurring entirely within New South Wales – where party brought claim under s 5 of the *Civil Aviation (Carriers' Liability) Act 1967* (NSW) in the Federal Court – where Federal Court lacked jurisdiction to decide claim – claimant brought claim in the Supreme Court under s 11(2) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) – Supreme Court claim brought more than two years after relevant carriage by air – whether order of the Federal Court dismissing claim for want of jurisdiction was a “relevant order” within the meaning of s 11(1) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) – whether claim in the Supreme Court was extinguished by s 34 of the *Civil Aviation (Carriers' Liability) Act 1959*

Litigants in person

[JK \(a pseudonym\) v St Vincent's Hospital Sydney Limited \[2021\] NSWCA 7](#)

PROCEDURE – litigants in person – unrepresented litigants – importance of adhering to length, content and form requirements for written submissions – no special rules or treatment for litigants in person

Necessary and proper parties

[In the Matter of Richards Contracting Co Management Pty Ltd \[2021\] NSWCA 34](#)

CIVIL PROCEDURE – parties – proper party – whether the Authority of the Insurers' Guarantee Fund a proper party to the proceedings

Pleadings

[Ah Sam v Mortimer \[2021\] NSWCA 327](#)

CIVIL PROCEDURE – Pleadings – Amendment – Late application for amendment – Primary judge suggested that respondent amend originating process to explicitly plead unconscionability – Case always conducted on basis of unconscionability – No injustice identified

[Bingo Holdings Pty Ltd v GC Group Company Pty Ltd \[2021\] NSWCA 184](#)

CIVIL PROCEDURE – pleadings – amendment – where applicant sought to plead an apportionable claim under s 34 of the *Civil Liability Act 2002* (NSW) – where Part VIA of the *Competition and Consumer Act 2010* (Cth) was the relevant statutory scheme – application for leave to appeal dismissed

CIVIL PROCEDURE – pleadings – amendment – where applicant did not identify any particular “concurrent wrongdoer”

[FEV Mono Constructions Pty Ltd v Beattie \[2021\] NSWCA 18](#)

CIVIL PROCEDURE – pleadings – striking out – where most pleaded particulars of negligence covered by advocate’s immunity – where some pleaded claims possibly maintainable – whether to address advocate’s immunity on pleadings – whether to strike out entire statement of claim with leave to replead

[Hana v Shad Legal Services Pty Ltd \[2021\] NSWCA 258](#)

CIVIL PROCEDURE — pleadings — striking out — abuse of process — where statement of claim pleads fact inconsistent with finding of Court of Appeal in earlier proceedings — statement of claim constitutes collateral attack on Court of Appeal’s decision — statement of claim struck out as abuse of process

[Harris v Harris \[2021\] NSWCA 329](#)

CIVIL PROCEDURE – pleadings – where derivative proceedings on behalf of company to recover management fees – where pleadings alleged certain management fees were “excessive” – defence asserted entitlement to reasonable remuneration – parties had served lay and expert evidence as to reasonable remuneration – respondents’ written opening put in issue whether remuneration was reasonable – whether appellants put on notice of case they had to meet

[Lambourne v Baker \[2021\] NSWCA 229](#)

CIVIL PROCEDURE — pleadings — implied abandonment — certain pleadings not expressly raised during trial — supporting evidence admitted — forensic decision by respondent to leave evidence unopposed — pleading unaddressed by primary judge — self-represented litigant — whether pleadings abandoned or merely overlooked in course of proceedings — remedy sought on appeal

[Johnson v Mackinnon \[2021\] NSWCA 152](#)

CIVIL PROCEDURE – Pleadings – Amendment – Late application for amendment on second day of trial – Amendments added alleged liability of appellant for representation by silence and clarified alleged liability of appellant for explicit proposal representations – Whether appellant deprived of opportunity to make “no case” submission – Whether primary judge failed to consider dictates of justice – Not necessary to recite considerations seriatim – Appellant not deprived of fair and reasonable opportunity to meet case – Pleadings sufficiently clear and specific, and not unfairly open-ended

CIVIL PROCEDURE – Pleadings – Construction of pleadings – Subparagraphs of pleadings not in precise correspondence with each other – Whether prejudicial construction by primary judge in finding that pleadings nevertheless sufficiently clear

[Rock v Henderson \[2021\] NSWCA 155](#)

CIVIL PROCEDURE – Pleadings – Striking out – Appeal against striking out of Statement of Claim in full – Where quantum of damages claimed identical to value of real property subject to family law proceedings – Whether proceedings brought for an improper or collateral purpose and thus an abuse of process – No sufficient basis for finding of abuse – Whether District Court erred in striking out applicant’s statement of claim as defective in form – Whether reasonable causes of action – Statement of claim not so defective as to justify striking out

Pro bono referral

[Arambatzis v Foundas \(No 2\) \[2021\] NSWCA 125](#)

CIVIL PROCEDURE – Representation – Unrepresented litigant – Pro bono referral – Second referral – Special reasons – Where barrister on first referral did not have benefit of published reasons for judgment regarding previous stay – Referral made

[Arambatzis v Foundas \(No 3\) \[2021\] NSWCA 189](#)

CIVIL PROCEDURE – Representation – Unrepresented litigant – Pro bono referral – Third referral – Where Bar Association has indicated that no further assistance will be provided without additional referral – No conditions for ceasing to provide ongoing assistance satisfied – Bar Association guidelines not relevant – Further referral made but ongoing effect of previous referral emphasised

[Dubow v Mid-Western Regional Council \(No 2\) \[2021\] NSWCA 223](#)

PRACTICE AND PROCEDURE – application for leave to appeal – stay of enforcement of costs order – referral for pro bono assistance – motion dismissed

[Guha v Guha \[2021\] NSWCA 245](#)

PRACTICE AND PROCEDURE – appeal – application for referral for pro bono assistance – second application in 3 year period – special reasons – attempt to rely on mediation agreement – advice from previous lawyers – mediation agreement not raised in court below – prospects of success

[Renshaw v New South Wales Lotteries Corporation Pty Ltd \[2021\] NSWCA 41](#)

CIVIL PROCEDURE – Pro bono referral – Where applicant impecunious and of limited capacity to conduct litigation – Where previous pro bono assistance provided on multiple occasions – Where complaints made to Legal Services Commissioner regarding previous legal representatives – Where absence of apparent merit to claims – Referral refused

Procedural fairness

[Ah Sam v Mortimer \[2021\] NSWCA 327](#)

APPEALS – Procedural fairness – Bias or apprehension of bias – Interventions by primary judge during appellant's questioning of witnesses – Rejection of evidence and strong

adverse findings – Allegations that primary judge lied – Late grant of leave to respondent to amend pleadings – No bias demonstrated

CIVIL PROCEDURE – Hearings – Procedural Fairness – Use of audio-visual link – Technology imperfect but no resulting injustice identified

[EFQ \(a pseudonym\) v Medical Council of New South Wales \[2021\] NSWCA 167](#)

PRACTICE AND PROCEDURE – Procedural fairness – whether there had been a breach of procedural fairness by the Medical Council of NSW in conducting a hearing pursuant to s 150 of the Health Practitioner Regulation National Law (NSW) in the applicant's absence – whether there was a breach of procedural fairness in the Council denying the applicant's request for an adjournment of that hearing – where applicant had been given sufficient notice of the hearing and where her application for an adjournment was raised only a day before the hearing was scheduled – where Tribunal was correct to conclude that there was no breach of procedural fairness by the Council

[Lichaa v Boutros \[2021\] NSWCA 322](#)

APPEALS — Procedural fairness — Failure to give reasons — Adequacy of reasons – failure to engage with the case presented by each party – duty to give reasons for rejecting evidence of expert or preferring evidence of one expert over another – whether the primary judge failed to adequately explain why the Appellant's expert evidence was rejected or why the Respondent's expert evidence was preferred.

[Manly Fast Ferry Pty Ltd v Wehbe \[2021\] NSWCA 67](#)

COURTS AND JUDGES – procedural fairness – judicial intervention – where expert witness conclave conducted via audio visual and audio link – whether excessive judicial questioning of experts – whether real danger that trial was unfair – whether the trial miscarried

[Muriniti v Mercia Financial Solutions Pty Ltd \[2021\] NSWCA 180](#)

APPEALS – procedural fairness – whether applicant was denied procedural fairness on the basis that the primary judge did not consider all of the grounds and arguments advanced by the applicant – whether applicant was denied procedural fairness in that the Court treated various findings made in the substantive judgment as beyond challenge for the purposes of the costs application – where applicant's arguments in the costs application were essentially a replication of the arguments that had been advanced and rejected by the primary judge in the substantive judgment – where no denial of procedural fairness

Production of documents

[Collier v Attorney General for New South Wales \[2021\] NSWCA 16](#)

CIVIL PROCEDURE – production of documents – documents in custody of the court – application pursuant to Uniform Civil Procedure Rules 2005 (NSW), r 33.13 – files sought to support application under *Vexatious Proceedings Act 2008* (NSW) – access to documents produced – parties to proceedings the subject of the filed notified – objection to access – grounds of objection

[Lewis v Lewis \[2021\] NSWCA 168](#)

SUBPOENAS – production of documents – redaction of parts of documents on ground of relevance – distinction between redaction for privilege and redaction for relevance

[Zong v Lin \[2021\] NSWCA 209](#)

CIVIL PROCEDURE – subpoenas – to produce documents – application to set aside – whether legitimate forensic purpose – whether subpoena irrelevant, too broad or issued for improper purpose – apparent relevance to application for security for costs – documents relating to appellants' source of funds – application to set aside subpoena dismissed

Removal of parties

[FEV Mono Constructions Pty Ltd v Beattie \[2021\] NSWCA 18](#)

CIVIL PROCEDURE – parties – removal of parties – where no cause of action pleaded or articulated in argument on behalf of second to fourth plaintiffs – whether to remove as parties under *Uniform Civil Procedure Rules*, r 6.29

Representative proceedings

[Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd \[2021\] NSWCA 206](#)

APPEALS – leave to appeal – representative proceedings – interlocutory orders – orders final with respect to the representative party – no finality as to group members claims – challenge to answers to common questions

Submissions

[Hassan v Sydney Local Health District \(No 2\) \[2021\] NSWCA 122](#)

APPEALS – procedure – Court of Appeal – motion seeking review of a decision of the Court dismissing application to review decision of a single judge – where suggestion that not all of the evidence or submissions had been considered by the reviewing court – where evidence and submissions voluminous, unstructured and discursive – extent of obligation to consider and address

[JK \(a pseudonym\) v St Vincent's Hospital Sydney Limited \[2021\] NSWCA 7](#)

PROCEDURE – litigants in person – unrepresented litigants – importance of adhering to length, content and form requirements for written submissions – no special rules or treatment for litigants in person

Suppression and non-publication orders

[Council of the Law Society of New South Wales v Karimjee \[2021\] NSWCA 179](#)

CIVIL PROCEDURE – hearings – suppression and non-publication orders – whether necessary to ensure consistency with extant suppression order of the District Court – where name published in publicly available judgments – no basis for order

[Renshaw v New South Wales Lotteries Corporation Pty Ltd \[2021\] NSWCA 41](#)

CIVIL PROCEDURE – Hearings – Suppression and non-publication – Where orders not appropriate at interlocutory stage – No orders made

Transfer from Supreme Court to Court of Appeal

[Arambatzis v Foundas \(No 3\) \[2021\] NSWCA 189](#)

CIVIL PROCEDURE – Jurisdiction – Transfer of Notice of Motion from Supreme Court to Court of Appeal

9. Constitutional Law

Chapter III of the Commonwealth Constitution

[Council of the New South Wales Bar Association v Siggins \[2021\] NSWCA 40](#)

CONSTITUTIONAL LAW – challenge to validity of certain provisions governing the legal profession in New South Wales or their application to the barrister – whether impugned provisions have any extra-territorial effect – whether s 117 of the Constitution operates to render the impugned provisions inapplicable to the barrister – whether impugned provisions invalid as contrary to s 92 of the Constitution – whether impugned provisions inconsistent with various provisions of the *Judiciary Act 1903* (Cth) – whether impugned provisions inconsistent with Chapter III of the Constitution as compromising the institutional integrity of Federal and State Courts

Inconsistency of laws

[Sydney Seaplanes Pty Ltd v Page \[2021\] NSWCA 204](#)

CONSTITUTIONAL LAW – Commonwealth and State relations – inconsistency of laws – Supreme Court proceedings pursuant to s 11(2) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) – where those proceedings are linked to incompetent Federal Court proceedings but operate independently of them – where s 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) operates to extinguish any claim for damages under s 5 of the *Civil Aviation (Carriers' Liability) Act 1967* (NSW) if not brought within two years after an accident – whether order made under s 11(2) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) undermined the purpose of s 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) – order under s 11(2) not a discretionary extension of time to bring a proceeding otherwise out of time

[Yenuga v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 293](#)

CONSTITUTIONAL LAW – Commonwealth and State relations – Inconsistency of laws – Where no relevant Commonwealth law identified – No inconsistency

'Matter'

[Singh v Khan \[2021\] NSWCA 281](#)

CONSTITUTIONAL LAW – The Judiciary – 'Matter' – Proceedings not owing existence to federal law but stayed by operation of federal law nevertheless constitute a 'matter' arising under federal law

Relationship between constitutional and non-constitutional issues

[Doyle's Farm Produce Pty Ltd v Murray Darling Basin Authority \(No 2\) \[2021\] NSWCA 246](#)

CONSTITUTIONAL LAW – relationship between constitutional and non-constitution issues –

role of intervening Attorney-General submitting that constitutional issue does not arise

State legislative power

[Yenuga v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 293](#)

CONSTITUTIONAL LAW – State legislative power – Proportionality – Whether lack of consonance between *Crimes (Domestic and Personal Violence) Act 2013* (NSW) and *Declaration on the Elimination of Violence against Women* – Act does not purport to enact Declaration as part of domestic law – Challenge misconceived

10. Contract

Agency agreement

[Guan v Lui \[2021\] NSWCA 65](#)

AGENCY — Property, Stock and Business Agents Act 2002 (NSW) — where person performs services without real estate agent licence — whether services performed as “real estate agent”

Breach of contract

[Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 \[2021\] NSWCA 162](#)

CONTRACTS – termination – breach of term – what constitutes gross negligence and gross misconduct

CONTRACTS – termination – breach of term – implied term – term implied in fact – implied term not to use position to obtain unauthorised benefit – where breach compounded by deliberate deception – gross misconduct

CONTRACTS – termination – breach by terminating party – whether repudiation of contract – whether acceptance of repudiation possible – whether party willing to perform obligations under the contract

[Miles v Luneburger Franchising Pty Ltd \[2021\] NSWCA 248](#)

CONTRACT — breach — where debt collection agreement prohibited principal taking any steps in relation to specified debt — where principal withdrew instructions of solicitors retained on behalf of principal by agent — whether breach of debt collection agreement

[Great Northern Developments Pty Ltd v Lane \[2021\] NSWCA 150](#)

CONTRACTS – breach of contract – consequences of breach – right to damages – where total failure of consideration

CONTRACTS – termination – consequences of termination – restitutionary claims – where total failure of consideration

Conditions precedent

[AMA Group Limited v ASSK Investments Pty Limited \[2021\] NSWCA 45](#)

CONTRACT – contractual construction – whether promise in Binding Heads of Agreement (HOA) to enter into Business Sale Agreements was subject to a condition precedent, namely the approval of the Purchaser’s Board – whether consideration for HOA illusory – whether condition precedent permitted Purchaser’s Board to withhold approval capriciously – whether primary judge’s construction accorded with commercial common sense – whether primary judge erred in ordering specific performance of HOA

Construction and interpretation

[Alexakis v Wan \[2021\] NSWCA 172](#)

CONTRACT – 2018 edition Law Society of New South Wales standard form contract for sale of land – construction – where additional clause 38 provided for payment of deposit in two instalments – where clause 2.3 made time for payment of second instalment “essential” – where deadline for payment not a business day – whether time for payment extended to next business day by clause 21.5 – whether exception to application of clause 21.5 “in the case of clauses 2 and 3.2” engaged

[Allianz Australia Insurance Limited v Rawson Homes Pty Ltd \[2021\] NSWCA 224](#)

CONTRACTS — Construction — Construction of insurance contract — Where policy insured against damage to construction projects — Where houses under construction damaged in hailstorm — Where policy provided for application of “deductible” — Whether “deductible” to be applied in respect of each house under construction, or whether to be applied only once to the total sum to be paid for damage caused by the hailstorm

[Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 \[2021\] NSWCA 162](#)

CONTRACTS – construction – interpretation – natural and ordinary meaning – no ambiguity – unusual term – Court must give effect to the language used

[Central Coast Council v Norcross Pictorial Calendars Pty Ltd \[2021\] NSWCA 75](#)

CONTRACTS – construction – interpretation – joint venture agreement – third party – successor clause – “successor to a party” – whether the expression is wide enough to include nominee – where there was no contemplation work would be carried out by another – where there are no clear words to construe nomination as conferring rights and obligations – where third party acquired its rights as nominee under separate contract

CONTRACTS – construction – interpretation – reflective loss principle – exception – where company has no cause of action – where there is no prospect of double recovery

CONTRACTS – construction – interpretation – indemnities – “in respect of” – “loss” – whether indemnities extend to loss of diminution in value of shares in nominee as a result of nominee incurring costs for rectification

[Charlton v National Australia Bank Limited \[2021\] NSWCA 111](#)

CONTRACT – construction and interpretation of trust deed – express and implied terms – whether trust deed had an express power of unilateral retirement – whether trust deed had a lacuna to be filled by implying a power of unilateral retirement

[Cromarty Resources Pty Ltd v Thalanga Copper Mines Pty Ltd \[2021\] NSWCA 284](#)

CONTRACTS — construction — where agreement to pay royalty following “actual sale” of mineral — where royalty a percentage of “net sales realisation” amount — whether “actual sale” occurs when title passes to buyer — whether “net sales realisation” is after deduction of sales realisation expenses

[Dyco Hotels Pty Ltd & Ors v Laundry Hotels \(Quarry\) Pty Ltd \[2021\] NSWCA 332](#)

CONTRACTS – construction – interpretation – contract for the sale of a hotel and associated business – where cl 50.1 required the business to be conducted in its “usual and ordinary course” – the meaning of “usual and ordinary course” – whether the phrase refers to the usual and ordinary course of hotel businesses generally or to the particular business – whether the business was required to be carried on in an identical manner to the way it was carried on pre-contract – objective intention of the parties – purpose of the transaction

CONTRACTS – construction – interpretation – contract for the sale of a hotel and associated business – COVID-19 pandemic – restrictions on trading – where risk passed on completion not on contract – whether such risk would include the significant restriction on trading resulting from the Public Health Orders – *Public Health Act 2010* (NSW), ss 7, 10 – Public Health (COVID-19 Places of Social Gathering) Order 2020 (NSW)

CONTRACTS – construction – interpretation – contract for the sale of a hotel and associated business – COVID 19 pandemic – restrictions on trading – severability – where cl 63.7 dealt with severance – whether cl 63.7 operated to sever cl 50.1 in the contract of a temporary supervening illegality – whether the Public Health Order rendered cl 50.1 unenforceable – whether cl 50.1 formed part of an indivisible whole by which the hotel and business was to be transferred as going concern – *Public Health Act 2010* (NSW), ss 7, 10 – Public Health (COVID-19 Places of Social Gathering) Order 2020 (NSW)

[Landream Melbourne Pty Ltd v Aust & NZ International Investment Group Pty Ltd \[2021\] NSWCA 318](#)

CONTRACTS — termination — whether agreement wrongfully terminated — construction — meaning of “change in control including change in the majority shareholding” — whether satisfied where majority shareholder ceased to hold any shares but no new majority shareholding created

[Miles v Luneburger Franchising Pty Ltd \[2021\] NSWCA 248](#)

CONTRACT — construction — interpretation — debt collection agreement — meaning of ‘collect’ — where agent obtained judgment debt against debtor — where debtor deregistered company — no monies collected from debtor — whether agent entitled to fee — whether agreement authorised agent to pursue other alleged debtors not specified in agreement

[Nerpl Developments Pty Ltd v Vella \[2021\] NSWCA 131](#)

CONTRACTS – construction – agreement resulting from mediation of dispute – heads of agreement – *Masters v Cameron* class 2 contract – proposed deed of release – parties to enter into deed to terminate earlier agreement – whether deed to include all terms of settlement

CONTRACTS – construction – agreement to grant easement – whether ambiguity – whether specified width included kerb, gutter and footpath

CONTRACTS – construction – implied terms – term to be necessary to give business efficacy – whether temporary easement for construction to be implied – whether expansion of easement to permit construction of roundabout to be implied

[Sui v Jiang \[2021\] NSWCA 285](#)

CONTRACT – construction – written contract largely in Mandarin entered into between two businessmen without legal assistance – contract concerned acquisition of 40% interest in company with interests in land - whether contract entitled investor after three years to sell the shares or alternatively to obtain title to 40% of the land – no material difference between competing translations – literal meaning of one last sentence favoured transfer of 40% of the land to exiting shareholder – whether legal meaning of contract accorded with literal meaning

[Jabbcorp \(NSW\) Pty Ltd v Strathfield Golf Club \[2021\] NSWCA 154](#)

CONTRACT – construction – design and construct contract – contractor claimed additional payment for works required pursuant to development consent – whether works were “Excluded Works” – significance of definition commencing “Notwithstanding any other

clause” – significance of grammatical meaning of clause – clause required to be read as a whole, harmoniously with other provisions in contract

[Bartier Perry Pty Ltd v Paltos \[2021\] NSWCA 158](#)

CONTRACTS – construction – interpretation – calculation of purchase price under formula prescribed in a put and call option agreement

Damages

[Housman v Camuglia \[2021\] NSWCA 106](#)

CONTRACT - damages - claim for consequential loss - construction works caused damage to neighbour's land - claim for lost rent - trial judge found apartments unlettable in light of damage to stairway - finding based on evidence of landlord and letting agent - no reference in reasons to unchallenged engineering evidence that stairway safe - whether reasons of trial judge inadequate - inutility of inadequate reasons as a ground where appeal is by way of rehearing - whether trial judge misused evidence admitted on limited basis - no error made out

[Miles v Luneburger Franchising Pty Ltd \[2021\] NSWCA 248](#)

DAMAGES — damages in contract — causation — loss of commercial opportunity — chance of obtaining fee for collecting a debt — where debtor company deregistered and likely insolvent — whether causation established — whether chance of acquiring fee had some value other than negligible or speculative

[Bartier Perry Pty Ltd v Paltos \[2021\] NSWCA 158](#)

APPEALS – damages – where primary judge awarded damages and required an undertaking as to repayment pending the outcome of related proceedings – whether primary judge erred in not assessing damages on a lump sum basis once and for all – whether this Court should itself determine the damages payable on a lump sum basis – approach for correct assessment of damages

Deeds

[Miles v Amos \[2021\] NSWCA 210](#)

DEEDS – execution – whether defendant signed deed – creditor and witness testified that

defendant signed deed – defendant testified that she did not sign deed – uncontradicted expert evidence that defendant’s signature was not authentic – primary judge dismissed proceedings on basis of not being persuaded that debtor had signed deed – whether conclusion disclosed appellable error – appeal dismissed

Due diligence costs

[Quality Bakers Australia Pty Limited v ISS Facility Management Pty Ltd \[2021\] NSWCA 74](#)

CONTRACT – contract providing for ongoing negotiation between parties following an initial period of due diligence – contract providing for further due diligence to be undertaken – construction of clauses providing for reimbursement of a capped amount of due diligence costs – whether potential service provider entitled to be reimbursed for its due diligence costs – no issue of principle

Essential terms

[Cromarty Resources Pty Ltd v Thalanga Copper Mines Pty Ltd \[2021\] NSWCA 284](#)

CONTRACTS — termination — where breach of time stipulation for making of payment — where demand made after giving further time for payment — whether breach of essential term justifying termination — whether repudiatory conduct evincing an unwillingness to render substantial performance

[LWB Disability Services South Limited t/as Life Without Barriers v Smith \[2021\] NSWCA 37](#)

CONTRACT – Contract of employment – whether location of employment in a letter of offer of employment was an essential term, breach of which gave rise to a right to terminate and a claim for damages – where employee asserted that employer’s insistence upon changing the employee’s work location amounted to repudiatory conduct and purported to accept that repudiation.

EMPLOYMENT & INDUSTRIAL LAW – Contract of employment – whether location of employment in a letter of offer of employment was an essential term, breach of which gave rise to a right to terminate and a claim for damages – where relevant Award contained mobility of staff clause which provided for employer to move employees around relevant District upon satisfaction of certain conditions – whether location as outlined in letter of offer ousted operation of mobility of staff clause in Award

Expert determination clause

[Lahey Constructions Pty Ltd v The State of New South Wales \[2021\] NSWCA 69](#)

CONTRACT – building and construction contracts – interpretation – expert determination clause – whether expert determination is final and binding – where parties’ precluded from commencing litigation following expert determination unless value of the determination exceeded a threshold amount – where value of the determination to be calculated without having regard to amounts paid under the *Building and Construction Industry Security of Payment Act 1999* (NSW)

Frustration

[Dyco Hotels Pty Ltd & Ors v Laundry Hotels \(Quarry\) Pty Ltd \[2021\] NSWCA 332](#)

CONTRACTS – termination – frustration – supervening illegality – contract for the sale of a hotel and associated business – COVID-19 – restrictions on trading – whether compliance with cl 50.1 was illegal because of the operation of the Public Health Order – where the effect of the temporary supervening illegality of cl 50.1 rendered the sale of the business not as a going concern – whether the respondent was entitled to demand completion in circumstances where it was not able to deliver possession of the hotel as a going concern – whether cl 50.1 of the contract made it a condition that the business be sold as a going concern – whether cl 50.1 was an essential term in that a purchaser would not have entered into the contract without the business being sold as a going concern – *Public Health Act 2010* (NSW), ss 7, 10 – Public Health (COVID-19 Places of Social Gathering) Order 2020 (NSW)

Implied terms

[Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 \[2021\] NSWCA 162](#)

CONTRACTS – termination – breach of term – implied term – term implied in fact – implied term not to use position to obtain unauthorised benefit – where breach compounded by deliberate deception – gross misconduct

[Charlton v National Australia Bank Limited \[2021\] NSWCA 111](#)

CONTRACT – construction and interpretation of trust deed – express and implied terms – whether trust deed had an express power of unilateral retirement – whether trust deed had a lacuna to be filled by implying a power of unilateral retirement

[Dyco Hotels Pty Ltd & Ors v Laundry Hotels \(Quarry\) Pty Ltd \[2021\] NSWCA 332](#)

CONTRACTS – implied terms – terms implied in law – contract for the sale of a hotel and associated business – whether there was an implied term to the effect that the obligation in cl 50.1 of the contract was limited to the extent permitted by law – *Public Health Act 2010* (NSW), ss 7, 10 – Public Health (COVID-19 Places of Social Gathering) Order 2020 (NSW)

[Fuller v Albert \[2021\] NSWCA 88](#)

CONTRACTS — implied terms — terms implied in fact — necessity — numerous alternative possible constructions — agreement constituted by combination of oral, written and implied terms

[Nergrl Developments Pty Ltd v Vella \[2021\] NSWCA 131](#)

CONTRACTS – construction – implied terms – term to be necessary to give business efficacy – whether temporary easement for construction to be implied – whether expansion of easement to permit construction of roundabout to be implied

[Bartier Perry Pty Ltd v Paltos \[2021\] NSWCA 158](#)

CONTRACTS – implied terms – terms implied in law – necessity

CONTRACTS – implied terms – terms implied in fact – necessary to give business efficacy

Jurisdiction clause

[Qantas Airways Ltd v Rohrlach \[2021\] NSWCA 48](#)

CONTRACT – contractual construction – proper scope of jurisdiction agreement in employment contract – where jurisdiction clause elliptical as to its scope – where multiple agreements – where jurisdiction clause only contained in one agreement – whether jurisdiction clause in one agreement applied to claim in respect of alleged breach of post-employment restraints contained in a related agreement

Loan advance

[EI-Cheikh v Miraki \[2021\] NSWCA 271](#)

APPEALS — Contracts — Whether loan advance paid pursuant to loan agreement — Error of primary judge — Where loan advance never repaid

Remedies

[Ah Sam v Mortimer \[2021\] NSWCA 327](#)

CONTRACTS – Remedies – Specific performance – Appellant unable to demonstrate that ready, willing, and able to complete – No entitlement to specific performance in alternative that agreement not void

[Fuller v Albert \(No 2\) \[2021\] NSWCA 183](#)

CONTRACT – remedies – specific performance – whether Court found breach of contract – order for specific performance does not require proof of breach – sufficiently reasonable apprehension of breach may support order for specific performance

[Fuller v Albert \(No 3\) \[2021\] NSWCA 226](#)

CONTRACTS – Remedies – Specific performance – Whether to exercise discretion to decline specific performance – Imbalance of rights and entitlements of parties – Impairment of development application – Lapse of time – Difficulty of framing orders for specific performance – Likelihood that ongoing supervision necessary – Land of no greater importance to appellant than its value – Availability of alternative remedies – Specific performance declined – *Lord Cairns' Act* damages awarded in substitution for specific performance – Resolution of competing valuations

Repudiation

[Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 \[2021\] NSWCA 162](#)

CONTRACTS – termination – breach by terminating party – whether repudiation of contract – whether acceptance of repudiation possible – whether party willing to perform obligations under the contract

[Carter v Mehmet \[2021\] NSWCA 286](#)

CONTRACTS — termination — repudiation of contract — implied refusal to perform — where purchasers raised requisitions on title — whether requisitions properly made — whether vendors adequately answered requisitions — whether vendors evinced intention no longer to be bound by contract

CONTRACTS — termination — repudiation of contract — erroneous construction of contract — where vendors insisted on payment of default interest — whether repudiation by insisting on erroneous construction of contract

[Dyco Hotels Pty Ltd & Ors v Laundry Hotels \(Quarry\) Pty Ltd \[2021\] NSWCA 332](#)

CONTRACTS – termination – repudiation of contract – wrongful termination – contract for the sale of a hotel and associated business – COVID-19 pandemic – restrictions on trading –

whether the respondent was entitled to issue a notice to complete and a notice of termination – whether the conduct of the respondent amounted to repudiation of the contract – whether the conduct of the respondent was such as to convey to a reasonable person in the position of the appellants renunciation either of the contract as a whole or a fundamental obligation under it

[Fuller v Albert \[2021\] NSWCA 88](#)

CONTRACTS — termination — repudiation of contract — acceptance of repudiation — allegations of fraud — whether terms of conversation amounted to repudiation — significance of pleadings inconsistent with terms of contract as later alleged

[Zhu v Wang \[2021\] NSWCA 240](#)

CONTRACTS — termination — contractual promise to comply with terms of commercial lease — lease breached — right to terminate subject to notice requirement — peremptory termination without notice — repudiation of contract — acceptance of repudiation

Restraint of trade

[Belflora Pty Ltd v Vinflora Pty Ltd \[2021\] NSWCA 178](#)

COMMERCE – restraint of trade – validity and reasonableness – legitimate interests – where restraint imposed a blanket protection from importation of goods from a subcontinent – whether blanket protection directed to preserve or maintain a personal or corporate relationship with a supplier – where restraint did not relate to any particular supplier – *Restraints of Trade Act 1976 (NSW)*, s 4

COMMERCE – restraint of trade – validity and reasonableness – public policy – where restraint imposed a blanket protection from importation of goods from a subcontinent – whether restraint was against the public interest – where restraint prohibited respondents from competing in the market for the supply and sale of goods from a subcontinent – *Restraints of Trade Act 1976 (NSW)*, s 4

Retainers

[ELB Pty Ltd v Lumina BPO Pty Ltd \[2021\] NSWCA 91](#)

CONTRACT – written retainer of accountants – scope – whether primary judge erred in concluding retainer extended to all work for a client of an accounting and financial nature – opinion evidence – whether evidence of accounting partner that certain work “required” to complete task was opinion evidence – whether evidence was admissible as expert opinion – Held – primary judge correct – appeal dismissed

[Great Northern Developments Pty Ltd v Lane \[2021\] NSWCA 150](#)

CONTRACTS – breach of contract – consequences of breach – right to damages – where total failure of consideration

CONTRACTS – termination – consequences of termination – restitutionary claims – where total failure of consideration

Right to terminate

[Zhu v Wang \[2021\] NSWCA 240](#)

CONTRACTS — termination — contractual promise to comply with terms of commercial lease — lease breached — right to terminate subject to notice requirement — peremptory termination without notice — repudiation of contract — acceptance of repudiation

Share sale agreement

[Ulladulla Creative Images Pty Ltd ACN 089 098 073 v Ian Tibbles \[2021\] NSWCA 289](#)

CONTRACT – share sale agreement – business affected by fire before agreement – business made claims on insurance policies – whether amount received after agreement from insurer for uninsured losses caught by contractual clause – use of evidence of parties' subjective intentions – primary judge erred in relying on evidence of intentions but construction nevertheless correct – appeal dismissed

Termination

[Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 \[2021\] NSWCA 162](#)

CONTRACTS – termination – breach of term – what constitutes gross negligence and gross misconduct

CONTRACTS – termination – breach of term – implied term – term implied in fact – implied term not to use position to obtain unauthorised benefit – where breach compounded by deliberate deception – gross misconduct

CONTRACTS – termination – breach by terminating party – whether repudiation of contract – whether acceptance of repudiation possible – whether party willing to perform obligations under the contract

[Carter v Mehmet \[2021\] NSWCA 286](#)

CONTRACTS — termination — repudiation of contract — implied refusal to perform — where purchasers raised requisitions on title — whether requisitions properly made — whether vendors adequately answered requisitions — whether vendors evinced intention no longer to be bound by contract

CONTRACTS — termination — repudiation of contract — erroneous construction of contract — where vendors insisted on payment of default interest — whether repudiation by insisting on erroneous construction of contract

[Cromarty Resources Pty Ltd v Thalanga Copper Mines Pty Ltd \[2021\] NSWCA 284](#)

CONTRACTS — termination — where breach of time stipulation for making of payment — where demand made after giving further time for payment — whether breach of essential term justifying termination — whether repudiatory conduct evincing an unwillingness to render substantial performance

[Fuller v Albert \[2021\] NSWCA 88](#)

CONTRACTS — termination — repudiation of contract — acceptance of repudiation — allegations of fraud — whether terms of conversation amounted to repudiation — significance of pleadings inconsistent with terms of contract as later alleged

[Great Northern Developments Pty Ltd v Lane \[2021\] NSWCA 150](#)

CONTRACTS – termination – consequences of termination – restitutionary claims – where total failure of consideration

[Landream Melbourne Pty Ltd v Aust & NZ International Investment Group Pty Ltd \[2021\] NSWCA 318](#)

CONTRACTS — termination — whether agreement wrongfully terminated — construction — meaning of “change in control including change in the majority shareholding” — whether satisfied where majority shareholder ceased to hold any shares but no new majority shareholding created

[Zhu v Wang \[2021\] NSWCA 240](#)

CONTRACTS — termination — contractual promise to comply with terms of commercial lease — lease breached — right to terminate subject to notice requirement — peremptory termination without notice — repudiation of contract — acceptance of repudiation

Total Failure of Consideration

[Great Northern Developments Pty Ltd v Lane \[2021\] NSWCA 150](#)

CONTRACTS – breach of contract – consequences of breach – right to damages – where total failure of consideration

CONTRACTS – termination – consequences of termination – restitutionary claims – where total failure of consideration

[Miraki v Griffith \[2021\] NSWCA 263](#)

RESTITUTION – total failure of consideration – prepayment for goods never delivered – where buyer dealt with father and son – payment into account in son’s name at his direction – where primary judge accepted son’s evidence that the father controlled that account and obtained the benefit of the funds deposited into it – whether son liable to make restitution

Unconscionable conduct

[Ah Sam v Mortimer \[2021\] NSWCA 327](#)

CONTRACTS – Unconscionable conduct – Special disadvantage – Contract for sale of 50% of real property – Advertisement by respondent for \$300,000 – One page agreement for \$250,000 presented by appellant – Other terms of agreement improvident – Respondent suffering from very poor eyesight – Appellant aware or ought to have been aware of such facts – Appellant unable to surmount high bar for overturning demeanour-based findings that respondent could not read agreement and was unaware of different price – Special disadvantage established – Agreement void – Appeal dismissed

Unitholders agreement

[Sara Stockham Pty Ltd v WLD Practice Holdings Pty Ltd \[2021\] NSWCA 51](#)

CONTRACT - unitholders agreement - one unitholder wished to exit - agreement contained provision for valuation of units of exiting unitholder - unitholders agreement also contained provision prohibiting trustee from effecting decisions in respect of Major Policy Issues without unanimous unitholder resolution - construction of those provisions determined as separate questions - whether valuer required to be satisfied that decisions made by trustee had complied with clause concerning Major Policy Issues

11. Corporations

Allotment of shares

[Mualim v Dzelme \[2021\] NSWCA 199](#)

CORPORATIONS – shares – exercise of power to allot shares – where director of family company allotted shares to himself – where effect of allotment was to confer control of company on the director – where hearsay evidence that director provided paperwork concerning allotment to shareholders – where no evidence of paperwork or content of paperwork – whether shareholders gave fully informed consent to allotment – whether share allotment should be set aside

Deregistration

[Allianz Australia Insurance Ltd v Viksne \[2021\] NSWCA 268](#)

CORPORATIONS — deregistration — order for reinstatement of registration under *Corporations Act 2001* (Cth), s 601AH(2) — where deregistered company named as defendant in initiating process — whether by operation of s 601AH(5) subsequent reinstatement of registration validates commencement of proceedings

Directors' duties

[Boros v Pages Property Investments Pty Ltd \[2021\] NSWCA 288](#)

CORPORATIONS – directors and officers – fiduciary duties – duty to act in good faith in the best interests of company – duty not to use position as director or officer improperly – duty to ensure proper financial records kept – acting as director for two related entities – conflict of duty and interest

[ET-China.com International Holdings Ltd v Cheung \[2021\] NSWCA 24](#)

CORPORATIONS – directors' duties – whether two directors breached their duties in relation to the sale of shares in a subsidiary of the company of which they were directors – whether transfer of shares in subsidiary company in 2012 transferred the beneficial ownership of those shares in all the circumstances of the case – whether shares transferred for nil consideration – whether sale of shares in subsidiary company in 2013 was at a gross undervalue

[Jagatramka v Wollongong Coal Limited \[2021\] NSWCA 61](#)

CORPORATIONS – directors and officers – fiduciary duties – duty to act in good faith in the best interests of company and for proper purpose – where board resolved to purchase a property for “visiting executives” of the group – appellants were sole occupants of the property – whether the appellants were “visiting executives” for the purposes of the resolution of the board

Minutes of board meetings

[ET-China.com International Holdings Ltd v Cheung \[2021\] NSWCA 24](#)

CORPORATIONS – minutes of board meetings – disputed version of minutes – competing versions of minutes does not mean that one version is necessarily false – when party alleging false minutes did not challenge director who signed minutes with that allegation

Ostensible authority

[Rowe v Metroll SA Pty Ltd \[2021\] NSWCA 196](#)

AGENCY – ostensible authority – man used company email address and corporate signature – man closely involved with company’s sole director in finalising orders of building materials – whether man had ostensible authority to bind company

CONTRACT – company purchased building materials from South Australian company – sole director guaranteed company’s obligations to supplier – guarantee expressed to be with Queensland company and “each related body corporate that supplies goods or services to the Customer” – South Australian supplier was related to Queensland company and had similar name – whether South Australian company could enforce guarantee

Take-over offers

[Keybridge Capital Ltd v WAM Active Ltd \[2021\] NSWCA 203](#)

CORPORATIONS – take-over offers – off-market bid – freeing off-market bids from defeating conditions – bifurcated conditions – where notice declaring the offer free of conditions was given within the seven day period of the close of the offer – whether the notice was effective to free the offer of a condition – *Corporations Act 2001* (Cth), s 650F

CORPORATIONS – take-over offers – off-market bid – freeing off-market bids from defeating conditions – bifurcated conditions – whether the condition related to the happening of an event or circumstance in s 652C(1) of the *Corporations Act 2001* (Cth)

12. Costs

Apportionment of costs

[Lambourne v Baker \(No 2\) \[2021\] NSWCA 282](#)

COSTS – variation of order – apportionment where appellant partly successful on appeal – interest on costs

[Queensland Bulk Water Supply Authority t/as Segwater v Rodriguez & Sons Pty Ltd \[2021\] NSWCA 206](#)

COSTS – apportionment of costs – wrongful conduct governed by Queensland law – proceedings brought in New South Wales – *Civil Procedure Act 2005* (NSW), s 98 applied

Calderbank letters

[Housman v Camuglia \[2021\] NSWCA 106](#)

COSTS - Calderbank letter - whether error in finding that appellants had unreasonably rejected offer - significance of factual error in letter - significance of offer being rejected before service of all evidence - no error made out

[McIntosh v Morris \[2021\] NSWCA 225](#)

COSTS — Party/Party — Exceptions to general rule that costs follow the event — Offers of compromise/Calderbank offers — General rule that costs follow the event — Proceedings discontinued or dismissed — Whether parties acted reasonably

[MetLife Insurance Limited v Sandstrom \[2021\] NSWCA 123](#)

COSTS – party/party – exceptions to general rule that costs follow the event – offers of compromise and Calderbank offers – assertion that appellant unreasonably failed to accept respondent’s Calderbank offer – whether primary judge erred in refusing to make a special costs order – primary judge did not err in the exercise of his costs discretion

[Super Vision Resources Ltd v AC Holdings Co Pty Ltd \(No 2\) \[2021\] NSWCA 14](#)

COSTS – offers of compromise/Calderbank offers – whether time allowed for consideration of offer reasonable

[Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd \(No 3\) \[2021\] NSWCA 160](#)

COSTS – Calderbank offer at first instance – where offeror would have been unsuccessful at first instance but where Calderbank offer, if accepted, would have resulted in appellant securing a more favourable outcome at first instance than it ultimately obtained as a result of its successful appeal

“Chorley” exception – recoverability of self-represented solicitors’ costs

[Burrows v Macpherson & Kelley Lawyers \(Sydney\) Pty Ltd \[2021\] NSWCA 148](#)

COSTS - “Chorley” exception - client sued former solicitor for negligence in failing to enforce a favourable costs order in Family Court proceedings - former solicitor represented by incorporated legal practice which was its sole shareholder - whether District Court erred in dismissing client’s action for negligence - former solicitor sought gross sum costs order - whether District Court erred in failing to grant second adjournment - whether District Court erred in making gross sum costs order - whether former solicitor to be equated with incorporated legal practice which represented it

[Spencer v Coshott \[2021\] NSWCA 235](#)

COSTS — Chorley exception — where party represented by incorporated legal practice of which he was the principal and sole director and shareholder — whether primary judge erred in denying solicitor applicant costs payable to incorporated legal practice — *Bell Lawyers Pty Ltd v Pentelow*

Claim for interest

[Hutley v Cosco \(No 2\) \[2021\] NSWCA 335](#)

COSTS – claim for interest – claim for interest to be back-dated to date costs paid – scope of *Civil Procedure Act 2005* (NSW), s 101(5) – whether variation of existing costs order – application of UCPR r 36.16(3A) – if applicable, variation sought out of time – whether order should be made

Costs assessment

[Ahern v Aon Risk Services Australia Ltd \[2021\] NSWCA 166](#)

COSTS – costs assessment – determination by review panel of amount of costs of assessment process and by whom payable – whether review panel required to determine “fair and reasonable amount”

[Huang v The Owners of Strata Plan No 7632 \[2021\] NSWCA 194](#)

COSTS — costs assessment — determination — review/appeal — jurisdiction to appeal from certificates in proceedings commenced prior to 1 July 2015

[Stanizzo v Fregnan \[2021\] NSWCA 135](#)

APPEALS – leave to appeal – costs assessment – where alleged that lawyers acting for party with benefit of costs order did so pro bono – whether costs assessment applicant liable to pay lawyers’ costs – no question of principle

Costs of proceedings at first instance

[Dungan v Padash \(No 2\) \[2021\] NSWCA 257](#)

COSTS — Where appellant succeeded in substantially reducing sum awarded to respondent — Where order that respondent pay appellant’s costs of the appeal — Whether appellant entitled to costs of the proceedings below — Where Motor Accidents Compensation Regulation 2015 requires the appellant to pay a certain amount of the respondent’s costs and disbursements in the court below — Where *Motor Accidents Compensation Act 1999* (NSW) fixes amount which appellant’s solicitors were permitted to charge, subject to an order otherwise — Whether such order to be made

General rule that costs follow the event

[Allianz Australia Insurance Limited v Rawson Homes Pty Ltd \(No 2\) \[2021\] NSWCA 334](#)

COSTS — Party/Party — Exceptions to general rule that costs follow the event — Offers of compromise/Calderbank offers — Where offer of compromise not served until after office hours on Friday before hearing and open for acceptance only until an hour before commencement of hearing

COSTS — Party/Party — General rule that costs follow the event — Application of the rule and discretion — Costs of proceedings below — Where appellant successful on appeal — Where issue on appeal “separable” and “dominant” — Where respondent substantially successful on factual issues below — Where costs of issues on which respondent succeeded below would vastly have exceeded costs on issues on which it failed

[Belflora Pty Ltd v Vinflora Pty Ltd \(No 2\) \[2021\] NSWCA 205](#)

COSTS – party/party – general rule that costs follow the event

[Fuller v Albert \(No 3\) \[2021\] NSWCA 226](#)

COSTS – Party/Party – Exceptions to general rule that costs follow the event – Offer of compromise made during hearing – Where appellant only liable for costs if successful solely on basis of offer – Offer not the basis of appellant’s success – No reason for costs not to follow event

COSTS – Party/Party – Exceptions to general rule that costs follow the event – Whether error found by Court of Appeal was attributable to successful appellant not raising point at trial – Where appellant has always advanced case in appropriate terms – No reason for costs not to follow event

[McIntosh v Morris \[2021\] NSWCA 225](#)

COSTS — Party/Party — Exceptions to general rule that costs follow the event — Offers of compromise/Calderbank offers — General rule that costs follow the event — Proceedings discontinued or dismissed — Whether parties acted reasonably

[MetLife Insurance Limited v Sandstrom \[2021\] NSWCA 123](#)

COSTS – party/party – exceptions to general rule that costs follow the event – offers of compromise and Calderbank offers – assertion that appellant unreasonably failed to accept respondent’s Calderbank offer – whether primary judge erred in refusing to make a special costs order – primary judge did not err in the exercise of his costs discretion

[Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin & Anor \(No 2\) \[2021\] NSWCA 98](#)

COSTS — Party/Party — General rule that costs follow the event — Application of the rule and discretion — Multiple issues — Where award in favour of plaintiff substantially reduced on appeal — Where issue on which defendant succeeded on appeal both severable and dominant — Costs award should reflect the parties’ degree of success — Impossibility of precisely assessing proportions of time spent and likely costs of different issues

[Owners of Strata Plan No 30791 v Southern Cross Constructions \(ACT\) Pty Ltd \(in liquidation\) \(No 2\) \[2021\] NSWCA 35](#)

COSTS — party/party — general rule that costs follow the event — application of the rule and discretion — where appellant partially successful in appeal involving multiple parties —

reduction commensurate with hearing time spent on successful aspects of appeal

[Sydney Trains v Batshon \[2021\] NSWCA 143](#)

COSTS - whether reason to depart from rule that costs should follow event - inclusion by appellant of voluminous irrelevant pages in appeal materials - where error by primary judge could have been corrected without need for appeal

Gross sum costs order

[Burrows v Macpherson & Kelley Lawyers \(Sydney\) Pty Ltd \[2021\] NSWCA 148](#)

COSTS - “Chorley” exception - client sued former solicitor for negligence in failing to enforce a favourable costs order in Family Court proceedings - former solicitor represented by incorporated legal practice which was its sole shareholder - whether District Court erred in dismissing client’s action for negligence - former solicitor sought gross sum costs order - whether District Court erred in failing to grant second adjournment - whether District Court erred in making gross sum costs order - whether former solicitor to be equated with incorporated legal practice which represented it

[Dubow v Mid-Western Regional Council \(No 3\) \[2021\] NSWCA 279](#)

PROCEDURE – costs – availability of gross costs order – notice of intention to make gross costs order – whether procedural unfairness

[Eliezer v The Council of St Andrew’s Cathedral School \(No 2\) \[2021\] NSWCA 227](#)

COSTS – gross sum costs order – where submissions and evidence in support of application for gross sum costs order served prior to the hearing of the applicants’ application for judicial review against the possibility that the application for judicial review was unsuccessful – where application for judicial review dismissed with costs – where Court made directions on delivery of judgment for applicants to provide submissions in response – whether application for a gross sum costs order was an application to set aside or vary the original costs order – whether application governed by UCPR r 36.16(3) or 36.16(3A) – where applicant for the gross sum costs order did not file a notice of motion seeking the order within 14 days of the costs order being entered – whether any requirement to do so should be dispensed with

[Q \(a pseudonym\) v E Co \(a pseudonym\) \(No 2\) \[2021\] NSWCA 15](#)

COSTS – gross sum costs order – *Civil Procedure Act 2005* (NSW), s 98(4) – order agreed

[Sayed v National Australia Bank Limited \[2021\] NSWCA 28](#)

COSTS — party/party — court’s discretion — costs fixed on gross sum basis

[Spencer v Coshott \(No 2\) \[2021\] NSWCA 266](#)

COSTS – gross sum costs – where administration of justice served by bringing litigation to an end

[Wormald v Maradaca Pty Ltd \[2021\] NSWCA 307](#)

COSTS – application for gross sum costs order – where gross sum costs order was not sought by the applicants when an earlier application to vary the original costs orders was sought and made – application refused

Indemnity costs

[C & E Critharis Constructions Pty Ltd v Cubic Metre Pty Ltd \(No 2\) \[2021\] NSWCA 60](#)

COSTS – application for indemnity costs order – applicant did not accept offer of compromise – offer required applicant to capitulate with no compromise as to costs or otherwise offered – respondent not entitled to indemnity costs

[Hungry Jack’s Pty Ltd v Fourtounas \(No 2\) \[2021\] NSWCA 26](#)

COSTS – indemnity costs – offer of compromise – whether offer open for reasonable period – whether offer involved compromise – default entitlement – power to order otherwise – onus on applicant to establish reasons for different costs order – Uniform Civil Procedure Rules 2005 (NSW) rr 20.26, 42.15A

[Hutley v Cosco \(No 2\) \[2021\] NSWCA 335](#)

COSTS – application for indemnity costs – offers of compromise – *Calderbank* offers – scope of *Defamation Act 2005* (NSW) s 40 – whether offers were reasonable when made – whether non-acceptance reasonable – whether offers genuine offers of compromise – offers made no provision for existing legal costs – application dismissed

[Mount Arthur Coal Pty Ltd v Duffin \[2021\] NSWCA 49](#)

COSTS – party/party – bases of quantification – indemnity basis – where offer purported to be made pursuant to UCPR r 20.26 – whether offer complied with requirements of r 20.26 – whether primary judge erred in ordering indemnity costs in reliance on offer

Joint and several liability for costs

[P & S Kauter Investments Pty Ltd v Arch Underwriting at Lloyds Ltd \[2021\] NSWCA 136](#)

COSTS – where separate proceedings against same defendants heard together – where most issues of fact and law common or closely related – where plaintiffs and defendants represented by the same lawyers in each proceeding – whether plaintiffs should be jointly and severally liable for defendants’ costs

Mixed outcome of proceedings

[Drive My Car Rentals Pty Ltd v Gabriel \[2021\] NSWCA 73](#)

COSTS – appeal to Supreme Court from Local Court – where mixed outcome in proceedings – where judge did not decide all grounds of appeal – where Court of Appeal decided remaining grounds of appeal – whether separate costs orders should be made

COSTS – appeal to Court of Appeal from Supreme Court – where respondent belatedly conceded error at the hearing – where appellant successful on principal ground of appeal – whether respondent should pay appellant costs of the appeal

[Will v Brighton \(No 2\) \[2021\] NSWCA 8](#)

COSTS – where mixed outcome of proceedings in Court of Appeal – costs in the discretion of the Court – no order as to costs

Multiple parties

[Owners of Strata Plan No 30791 v Southern Cross Constructions \(ACT\) Pty Ltd \(in liquidation\) \(No 2\) \[2021\] NSWCA 35](#)

COSTS — party/party — orders when proceedings involve multiple parties on appeal — allegations of concurrent wrongdoing by respondents — appeal successful against one respondent but not against another — appellant did not pursue concurrent wrongdoing allegations at hearing — whether appellant’s costs in respect of the successful respondent should be ordered against the unsuccessful respondents

[Super Vision Resources Ltd v AC Holdings Co Pty Ltd \(No 2\) \[2021\] NSWCA 14](#)

COSTS – orders when proceedings involve multiple parties – where no relief sought against one defendant – where that defendant joined in defence with other defendant – whether to order plaintiff’s costs be paid by those defendants jointly

Offers of compromise

[Bassett v Bassett \[2021\] NSWCA 320](#)

COSTS – Offers of compromise – where offers of compromise were capable of acceptance and did represent a genuine element of compromise – where although the offeror could be said to have obtained a judgment no less favourable than the terms of the offer within the meaning of the Uniform Civil Procedure Rules 2005 (NSW) r 42.14(2), the Court “ordered otherwise” as to costs

[Super Vision Resources Ltd v AC Holdings Co Pty Ltd \(No 2\) \[2021\] NSWCA 14](#)

COSTS – offers of compromise/Calderbank offers – whether time allowed for consideration of offer reasonable

“Order otherwise” as to costs

[Bassett v Bassett \[2021\] NSWCA 320](#)

COSTS – Offers of compromise – where offers of compromise were capable of acceptance and did represent a genuine element of compromise – where although the offeror could be said to have obtained a judgment no less favourable than the terms of the offer within the meaning of the Uniform Civil Procedure Rules 2005 (NSW) r 42.14(2), the Court “ordered otherwise” as to costs

[Nadilo v Eagleton \[2021\] NSWCA 232](#)

COSTS – where Class 4 proceedings in Land and Environment Court dismissed by consent – where on application under UCPR r 42.20(1) primary judge ordered “otherwise” by making no order as to costs – where notwithstanding consent orders applicant clearly successful party – whether manifest error in failing to order respondents pay applicant’s costs of proceedings

Partial success of a party

[Lambourne v Baker \(No 2\) \[2021\] NSWCA 282](#)

COSTS – variation of order – apportionment where appellant partly successful on appeal – interest on costs

Party/party costs

[Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 \(No 2\) \[2021\] NSWCA 331](#)

COSTS – party/party – appeals – whether the respondent should pay its costs of the proceedings in the court below – whether there should be no order as to costs – where the primary judge’s conclusions in favour of the respondent on some issues was upheld

[Fuller v Albert \(No 3\) \[2021\] NSWCA 226](#)

COSTS – Party/Party – Exceptions to general rule that costs follow the event – Offer of compromise made during hearing – Where appellant only liable for costs if successful solely on basis of offer – Offer not the basis of appellant’s success – No reason for costs not to follow event

COSTS – Party/Party – Exceptions to general rule that costs follow the event – Whether error found by Court of Appeal was attributable to successful appellant not raising point at trial – Where appellant has always advanced case in appropriate terms – No reason for costs not to follow event

[Lianos v Order of AHEPA NSW Inc \(No 5\) \[2021\] NSWCA 317](#)

COSTS – party/party – appeals – unsuccessful applications for joinder and reopening of appeal after appeal decision handed down – limited success of applicants in having orders varied to cure misapprehension of Court – respondents achieved significant measure of success on substantial issues – applicants to pay 50% of the respondents’ costs

[McIntosh v Morris \[2021\] NSWCA 225](#)

COSTS — Party/Party — Exceptions to general rule that costs follow the event — Offers of compromise/Calderbank offers — General rule that costs follow the event — Proceedings discontinued or dismissed — Whether parties acted reasonably

[MetLife Insurance Limited v Sandstrom \[2021\] NSWCA 123](#)

COSTS – party/party – exceptions to general rule that costs follow the event – offers of compromise and Calderbank offers – assertion that appellant unreasonably failed to accept respondent’s Calderbank offer – whether primary judge erred in refusing to make a special costs order – primary judge did not err in the exercise of his costs discretion

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

COSTS – Party/Party – Appeals – Equal measure of success and failure for each party on appeal – Appellant improved position but incurred and inflicted unnecessary costs – No order as to costs of appeal and primary proceedings

[Mount Arthur Coal Pty Ltd v Duffin \[2021\] NSWCA 49](#)

COSTS – party/party – bases of quantification – indemnity basis – where offer purported to be made pursuant to UCPR r 20.26 – whether offer complied with requirements of r 20.26 – whether primary judge erred in ordering indemnity costs in reliance on offer

[Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin & Anor \(No 2\) \[2021\] NSWCA 98](#)

COSTS — Party/Party — General rule that costs follow the event — Application of the rule and discretion — Multiple issues — Where award in favour of plaintiff substantially reduced on appeal — Where issue on which defendant succeeded on appeal both severable and dominant — Costs award should reflect the parties' degree of success — Impossibility of precisely assessing proportions of time spent and likely costs of different issues

[Owners of Strata Plan No 30791 v Southern Cross Constructions \(ACT\) Pty Ltd \(in liquidation\) \(No 2\) \[2021\] NSWCA 35](#)

COSTS — party/party — general rule that costs follow the event — application of the rule and discretion — where appellant partially successful in appeal involving multiple parties — reduction commensurate with hearing time spent on successful aspects of appeal

COSTS — party/party — orders when proceedings involve multiple parties on appeal — allegations of concurrent wrongdoing by respondents — appeal successful against one respondent but not against another — appellant did not pursue concurrent wrongdoing allegations at hearing — whether appellant's costs in respect of the successful respondent should be ordered against the unsuccessful respondents

[Sayed v National Australia Bank Limited \[2021\] NSWCA 28](#)

COSTS — party/party — court's discretion — costs fixed on gross sum basis

[Rahman v Al-Maharmeh \(No 2\) \[2021\] NSWCA 151](#)

COSTS – Party/Party – Appeals – Appeal against refusal of leave to commence proceedings out of time – Delay attributable to appellant's solicitors – Unsatisfactory explanation for delay – Respondent opposed application and led court below into error – Costs not sought by respondent against appellant – No order as to costs between parties

Personal costs order

[Muriniti v Mercia Financial Solutions Pty Ltd \[2021\] NSWCA 180](#)

APPEALS – appeal from primary judgment making personal costs orders against the applicant pursuant to Sch 2 of the Legal Profession Uniform Law Application Act 2014 (NSW) and s 99 of the Civil Procedure Act 2005 (NSW) – where applicant was the legal practitioner for the defendant in the proceedings below and made allegations of fraudulent misrepresentation and conspiracy without any proper basis – where solicitor breached his professional ethical duties in pursuing the claims

COSTS – where primary judge imposed personal costs orders against the legal practitioner of the unsuccessful party in proceedings below – where applicant was the legal practitioner for the defendant in the proceedings below and improperly made allegations of fraudulent misrepresentation and conspiracy without any evidence to support it – where solicitors breached their professional ethical duties in pursuing the claims

COSTS – whether in an application for costs orders against a legal practitioner under s 99 of the Civil Procedure Act 2005 (NSW), the Court is entitled to take account of its findings in the substantive judgment – whether a legal practitioner against whom such costs orders are sought is bound by findings in the substantive judgment, even though the legal practitioner was not formally a party to the proceedings – where in the present case, the applicant was given a full and fair opportunity to explain the basis upon which he made the relevant allegations and to rebut the statutory presumption arising under cl 6 of Sch 2 to the Legal Profession Uniform Law Application Act 2014 (NSW)

Security for costs

[Black Hill Residents Group Inc v Marist Youth Care Ltd \[2021\] NSWCA 314](#)

COSTS — Security for costs — Relevant factors — Impecuniosity — Whether evidence establishes that members of incorporated association do not have means to provide the security sought — Strength of the claim — Where opponent’s submissions on appeal fail to grapple with finding central to the determination below

[Boros v Pages Property Investments Pty Ltd \[2021\] NSWCA 50](#)

COSTS – security for costs – on appeal – where appellant impecunious – where evidence suggests order for security would not stultify appeal – whether “special circumstances” within *Uniform Civil Procedures Rules*, r 51.50

[Murray John Carter v Ian Mehmet t/as ATF Ian G Mehmet Testamentary Trust \[2021\] NSWCA 32](#)

COSTS — security for costs — costs of appeal where appellants’ lawyers stand to benefit from prosecution of appeal — where prospects of success of appeal questionable — whether security for costs should be ordered, and if so in what amount

[Carter v Mehmet \(No 2\) \[2021\] NSWCA 333](#)

COSTS — security for costs — where appellants provided security for respondents’ costs of the appeal — where appeal allowed — order for release of sum paid as security

[PPK Willoughby Pty Ltd v Baird \[2021\] NSWCA 212](#)

COSTS – Security for costs – On appeal – Statutory power under *Corporations Act 2001* (Cth) s 1335 – Relevant factors – Where credible evidence that appellant may be unable to pay adverse costs order if unsuccessful – Where appellant did not appear to oppose security – Reductions to excessive proposed quantum – Security for costs ordered

[Ulladulla Creative Images Pty Ltd v Tibbles \[2021\] NSWCA 200](#)

COSTS – Security for costs – On appeal – Statutory power under *Corporations Act 2001* (Cth), s 1335 – Relevant factors – Where credible evidence that appellant may be unable to pay adverse costs order if unsuccessful – Where director/sole shareholder declined to expose themselves to adverse costs order – Reductions to excessive proposed quantum – Security for costs ordered

[Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd \[2021\] NSWCA 90](#)

COSTS — Security for costs — Quantum and form

[Zhu v Wang \[2021\] NSWCA 109](#)

APPEAL – security for costs – Uniform Civil Procedure Rules 2005 (NSW) r 51.50 – “special circumstances” not established

[Zong v Wang \[2021\] NSWCA 214](#)

COSTS — security for costs — on appeal — application under UCPR r 51.50 — special circumstances — non-compliance with curial procedure — application granted

Third party costs orders

[Rahman v Al-Maharmeh \(No 2\) \[2021\] NSWCA 151](#)

COSTS – Appeals – Orders against non-parties – Personal costs orders against lawyers – As between respondent and appellant’s solicitors – Solicitors acted negligently – Respondent increased costs considerably by opposing application – Orders not made

COSTS – Appeals – Orders against non-parties – Personal costs orders against lawyers – As between appellant and appellant’s solicitors – Costs incurred without reasonable cause – Relevance of undertaking by solicitors to not seek costs against appellant – Orders made

Varying cost orders

[Eliezer v Yang \[2021\] NSWCA 220](#)

APPEAL – leave to appeal – where application under UCPR, r 36.15 to set aside costs orders made in earlier interlocutory proceedings – where primary judge made one of the costs orders sought to be varied – where primary judge refused to disqualify himself for apprehended bias – where r 36.15 application dismissed – where challenges to those orders have no realistic prospects of success – leave to appeal refused

[Lambourne v Baker \(No 2\) \[2021\] NSWCA 282](#)

COSTS – variation of order – apportionment where appellant partly successful on appeal – interest on costs

Wasted costs order

[Rahman v Al-Maharmeh \[2021\] NSWCA 31](#)

COSTS – Wasted costs order – Where solicitors responsible for failure to commence proceedings in time – Direction made that submissions be lodged as to costs and potential under (NSW) *Civil Procedure Act 2005*, s 99

Where appellant successful on appeal on a point different to that made at first instance

[AMA Group Limited v ASSK Investments Pty Limited \(No 2\) \[2021\] NSWCA 116](#)

COSTS – where successful appellant succeeds on appeal on a point different to that made orally at first instance – where departure from argument made orally (but not in writing) at first instance justifies a partial departure from usual rule that costs follow the event – question of discretion in all the circumstances of the case

13. Crime

Appeal and review

[Stanley v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 337](#)

CRIME – appeal and review – appeal against sentence from Local Court to District Court – District Court dismissed appeal – where District Court judge decided not to order that full-time custodial sentence be served by way of intensive correction order – judicial review – limited to review for jurisdictional error by privative clause in s 176 of *District Court Act 1973* (NSW) – where assessment contemplated by s 66(2) of *Crimes (Sentencing Procedure) Act 1999* (NSW) not undertaken – whether failure to conduct assessment amounted to jurisdictional error

[Veira v Cook \[2021\] NSWCA 302](#)

CRIME – appeal and review – application for leave to appeal from Supreme Court orders dismissing appeal from Local Court – where applicant convicted of unlawfully entering inclosed lands and interfering with business – where conduct done to remove chickens from cruel conditions – whether defence of necessity available – consideration of *R v Rogers* (1996) 86 A Crim R 542

High risk offenders

[Hardy v State of New South Wales \[2021\] NSWCA 338](#)

HIGH RISK OFFENDERS – extended supervision orders – definition of eligible offender – advocating support for “terrorist act” or “violent extremism” – carrying out violent acts not sufficient – delivery of letters threatening member of State Parliament – threat visible to staff who received letters – transient delusional disorder not sufficient to negate intention – nature of double intention required – *Terrorism (High Risk Offenders) Act 2017* (NSW), s 10(1)(c)(i)

HIGH RISK OFFENDERS – extended supervision orders – assessing “unacceptable risk” of committing a “serious terrorism offence” – questioning of expert witness as to effect of delusions denied by offender – basis for rejection of opinion of court-appointed experts – reliance on failure of offender to give evidence – *Terrorism (High Risk Offenders) Act 2017* (NSW), s 20(d)

Post appeal review

[Folbigg v Attorney General of New South Wales \[2021\] NSWCA 44](#)

CRIMINAL LAW – post-appeal review – petition to Governor – doubt or question as to person’s guilt – judicial officer appointed to conduct inquiry – legal test to be applied by judicial officer – “reasonable doubt as to guilt of convicted person” – *Crimes (Appeal and*

Review) Act 2001 (NSW), s 82(2)(a)

14. Criminal procedure

Jurisdiction of Children's Court

[Lacey \(a pseudonym\) v Attorney General for New South Wales \[2021\] NSWCA 27](#)

COURTS – jurisdiction – criminal jurisdiction of Children's Court – where young person sought to have charges heard by a female magistrate and to have males excluded from court for certain evidence and from viewing that evidence – powers of the Children's Court to deal with criminal charges against a young person

APPEALS – appeal from refusal by Children's Court of application to have proceedings heard by a female magistrate – whether amenable to appeal to the Supreme Court under the Crimes (Appeal and Review) Act 2001 (NSW)

Submission of questions of law to Court of Criminal Appeal

[Gibson v Director of Public Prosecutions \(NSW\) \(No 2\) \[2021\] NSWCA 218](#)

ADMINISTRATIVE LAW – Judicial review – where questions sought to be referred by the applicant to the Court of Criminal Appeal were plainly not pure “questions of law” – where any jurisdictional error by the primary judge in finding that she lacked power to refer questions to the Court of Criminal Appeal because she was *functus officio* was thus immaterial – where relief withheld in the exercise of the Court's discretion because of its lack of demonstrated utility

CRIMINAL PROCEDURE – Submission of purported questions of law to Court of Criminal Appeal – nature of the power and role of a District Court judge in deciding whether or not to submit a question of law to the Court of Criminal Appeal – contextual considerations surrounding the operation of s 5B of the *Criminal Appeal Act 1912* (NSW)

CRIMINAL PROCEDURE – Submission of purported questions of law to Court of Criminal Appeal – where applicant submitted questions informally via email to the Registrar of the Local Court – where no formal order was made by the primary judge dismissing the applicant's request to state a case to the Court of Criminal Appeal – where no reasons were published by the primary judge for declining the applicant's request – where applicant was advised of the primary judge's refusal to state a case via an email from the Registrar of the Local Court

CRIMINAL PROCEDURE – Submission of purported questions of law to Court of Criminal Appeal – where questions sought to be referred to the Court of Criminal Appeal were plainly not pure “questions of law”

15. Defamation

Defences

[Hutley v Cosco \[2021\] NSWCA 17](#)

DEFAMATION – defamatory statement made in interview with reporter – defences – justification – substantial truth – conduct forming basis of imputation reactive to poor behaviour of defendant – whether defamatory statement by defendant not substantially true

DEFAMATION – defences – defence of contextual truth – further harm done by plaintiff's imputations – whether harm done by substantially true plaintiff's imputations to be weighed against contextual imputations – *Defamation Act 2005* (NSW), s 26(b)

[Schlaepfer v Australian Securities & Investments Commission \[2021\] NSWCA 129](#)

DEFAMATION – Defences – Defence of qualified privilege at common law and under Defamation Act 2005 – Whether reasonableness required to be proved to establish defence at common law having regard to defence as pleaded – Whether reasonableness established – Defence of justification – Where ASIC sought to establish truth of imputation of market manipulation without attempting to establish the individual trading of any particular trader or pod of traders – Contention that the relevant company had engaged in the impugned conduct on “any one or more” of 23 “occasions” – Expert opinion evidence concerning proof of impugned conduct by the establishment of certain metrics observed in the company's trading – Whether sufficient to establish truth defence

[Wraydeh v Fairfax Media Publications Pty Limited; Wraydeh v Nationwide News Pty Limited \[2021\] NSWCA 153](#)

DEFAMATION – defences – common law qualified privilege – privileged occasion – privileged communication – whether communication relevant to privileged occasion – no test of necessity – news publications based on police media releases – additional information in publications not foreign to occasion of privilege

Publication

[Schlaepfer v Australian Securities & Investments Commission \[2021\] NSWCA 129](#)

DEFAMATION – Publication – Slander – Where appellant relied on contemporaneous email to prove publication of the words allegedly said – Whether slander proved in the terms pleaded – Whether appellant identified by the matters complained of – Whether imputations complained of by appellant conveyed to the ordinary reasonable listener

Remedies

[Wraydeh v Fairfax Media Publications Pty Limited; Wraydeh v Nationwide News Pty Limited \[2021\] NSWCA 153](#)

DEFAMATION – remedies – compensatory damages – whether assessment of damages manifestly inadequate – primary judge justified in using appellant’s failure to correct the record as indicative that the appellant was not hurt and distressed as claimed

DEFAMATION – remedies – compensatory damages – whether assessment of damages manifestly inadequate – adverse credibility findings

16. Disciplinary proceedings

Barristers’ professional misconduct

[Council of the New South Wales Bar Association v EFA \(a pseudonym\) \[2021\] NSWCA 339](#)

OCCUPATIONS – legal practitioners – barristers – misconduct and discipline – disciplinary proceedings – professional misconduct – where respondent is a practising barrister – respondent engaged in demeaning, humiliating and inexcusable conduct towards a female clerk at a dinner – New South Wales Civil and Administrative Tribunal found that the respondent had engaged in “unsatisfactory professional conduct” – respondent alleged to have said the words “suck my dick” to the female clerk – where immediate verbal complaint made by female clerk to a colleague – where the events of the dinner were recorded by closed circuit television cameras – where the Court was in as good a position as the Tribunal to determine questions of fact – whether the respondent said to H the words “suck my dick”

OCCUPATIONS – legal practitioners – barristers – misconduct and discipline – professional misconduct – where professional misconduct is defined in s 297 of the *Legal Profession Uniform Law (NSW)* – where that definition is expressed to be “inclusive” of the traditional definition of “professional misconduct” at common law – where the Court has inherent jurisdiction to supervise members of the legal profession in New South Wales – where the admission, suspension or removal of legal practitioners in exercise of that jurisdiction considers whether a person is a “fit and proper to engage in legal practice” – where the applicant contended that *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 created a distinct category of “professional misconduct” at common law – whether there is a distinct category of professional misconduct at common law beyond that which is incorporated into s 297 of the *Legal Profession Uniform Law (NSW)*

OCCUPATIONS – legal practitioners – barristers – misconduct and discipline – professional misconduct – where s 297 of the *Legal Profession Uniform Law (NSW)* defines “professional misconduct” as including conduct “that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice” – where conduct that would justify a finding of unfitness is not necessarily

conduct that must result in such a finding – where unfitness is not measured by the objective circumstances of the conduct alone but also by consideration of character – whether the respondent’s conduct would justify a finding that he was not a fit and proper person to engage in legal practice

OCCUPATIONS – legal practitioners – barristers – misconduct and discipline – professional misconduct – grounds for disciplinary orders – where respondent said the words “suck my dick” to a female clerk – where the respondent’s conduct and words warranted severe condemnation – where the Court has and will have no tolerance for conduct of legal practitioners that does not recognise and meet appropriate standards in respect of the treatment of women – where the objective of disciplinary orders is protective and not punitive – where the Tribunal found that the respondent’s conduct was an isolated instance of departure from accepted norms – where the respondent has suffered significant personal, emotional and financial cost as a result of his conduct – whether the Tribunal erred in its assessment of the seriousness of the respondent’s conduct by imposing only a formal reprimand

17. Dispute resolution

Arbitration

[Rinehart v Rinehart \[2021\] NSWCA 228](#)

CIVIL PROCEDURE – leave to appeal – where proceeding referred to arbitration and balance stayed – whether arbitration agreement applied to referred proceeding – whether error in ordering stay – leave to appeal refused

18. Dust diseases

Damages

[Allianz Australia Insurance Ltd v Viksne \[2021\] NSWCA 268](#)

DUST DISEASES — damages for non-economic loss — where proceedings commenced before plaintiff’s death — where deregistered company named as defendant — whether subsequent reinstatement of registration has consequence that proceedings deemed to have been validly commenced and pending at time of death for purposes of operation of *Dust Diseases Tribunal Act 1989* (NSW), s 12B

Restitution

[L & A Fazzini Pty Ltd v Amaca Pty Ltd \[2021\] NSWCA 313](#)

RESTITUTION — where contribution assessment determination made as part of claims resolution process under Pt 4 of the Dust Diseases Tribunal Regulation 2013 — where co-defendants to a claim in the Dust Diseases Tribunal consent to orders giving effect to determination without admission of liability — where claim in restitution by one co-defendant against the other — onus of proof

19. Employment and industrial law

Contract of employment

[LWB Disability Services South Limited t/as Life Without Barriers v Smith \[2021\] NSWCA 37](#)

CONTRACT – Contract of employment – whether location of employment in a letter of offer of employment was an essential term, breach of which gave rise to a right to terminate and a claim for damages – where employee asserted that employer’s insistence upon changing the employee’s work location amounted to repudiatory conduct and purported to accept that repudiation.

EMPLOYMENT & INDUSTRIAL LAW – Contract of employment – whether location of employment in a letter of offer of employment was an essential term, breach of which gave rise to a right to terminate and a claim for damages – where relevant Award contained mobility of staff clause which provided for employer to move employees around relevant District upon satisfaction of certain conditions – whether location as outlined in letter of offer ousted operation of mobility of staff clause in Award.

[Qantas Airways Ltd v Rohrlach \[2021\] NSWCA 48](#)

CONTRACT – contractual construction – proper scope of jurisdiction agreement in employment contract – where jurisdiction clause elliptical as to its scope – where multiple agreements – where jurisdiction clause only contained in one agreement – whether jurisdiction clause in one agreement applied to claim in respect of alleged breach of post-employment restraints contained in a related agreement.

EMPLOYMENT – restraints of trade – where senior executive employed pursuant to an Employment Agreement containing post-employment restraints of trade and an exclusive jurisdiction clause for courts of Singapore and a Singapore choice of law clause – where executive posted to Japan pursuant to a further contract but with his original contract continuing in effect – where executive also subject to a deed poll containing further post-employment restraints and governed by Japanese law – where employer sued to enforce only restraints contained in deed poll – whether proceedings caught by exclusive jurisdiction clause contained in original Employment Agreement – whether proceedings in New South Wales should be stayed

Discrimination

[Vitality Works Australia Pty Ltd v Yelda \(No 2\) \[2021\] NSWCA 147](#)

EMPLOYMENT AND INDUSTRIAL LAW – discrimination – harassment – sexual harassment – where applicant was contracted to design, publish, display and distribute a poster depicting a captioned photograph of the respondent at her workplace – whether conduct was “other unwelcome conduct of a sexual nature” – whether parties were “workplace participants” – Anti-Discrimination Act 1977 (NSW), ss 22A, 22B

Police officers

[Day v SAS Trustee Corporation \[2021\] NSWCA 71](#)

EMPLOYMENT AND INDUSTRIAL LAW – public sector – police – *Police Regulation (Superannuation) Act 1906* (NSW), s 10B(2) – where primary judge found appellant incapacitated by transient condition for short period at time of resignation from police force – whether it follows that appellant incapable from infirmity of body or mind of exercising the functions of a police officer at that time – meaning of “infirmity” in *Police Regulation (Superannuation) Act*

[MetLife Insurance Limited v Sandstrom \[2021\] NSWCA 123](#)

INSURANCE – claim by ex-police officer for total and permanent disability (“TPD”) payment – need to provide proof to satisfaction of insurer of TPD under policies – contractual obligations of insurer to assess claim in good faith and act fairly and reasonably – whether insurer breached contractual obligations – whether it was fair of insurer to rely on certain medical opinions as adverse to claimant – whether insurer took into account written submissions of claimant – cumulative effect demonstrated a lack of overall fairness

Restraints of trade

[Qantas Airways Ltd v Rohrlach \[2021\] NSWCA 48](#)

EMPLOYMENT – restraints of trade – where senior executive employed pursuant to an Employment Agreement containing post-employment restraints of trade and an exclusive jurisdiction clause for courts of Singapore and a Singapore choice of law clause – where executive posted to Japan pursuant to a further contract but with his original contract continuing in effect – where executive also subject to a deed poll containing further post-employment restraints and governed by Japanese law – where employer sued to enforce only restraints contained in deed poll – whether proceedings caught by exclusive jurisdiction clause contained in original Employment Agreement – whether proceedings in New South Wales should be stayed

20. Environmental and planning law

Aboriginal heritage

[Carter v Mehmet \[2021\] NSWCA 286](#)

ENVIRONMENT AND PLANNING — heritage conservation — protection of Aboriginal heritage — *National Parks and Wildlife Act 1974* (NSW) — meaning of “Aboriginal object”

Breach of development consent

[Settlers Estate Pty Ltd v Penrith City Council \[2021\] NSWCA 13](#)

APPEAL – breach of development consent – construction certificate part of development consent – drainage line not constructed in location shown on construction certificate plan – construction of construction certificate plan – whether misconstruction – judicial notice – whether common knowledge – refusal of leave to reopen – whether denial of procedural fairness – whether incorrect factual or legal assumption – leave to appeal refused

Consent

[Ku-ring-gai Council v Buyozo Pty Ltd \[2021\] NSWCA 177](#)

ENVIRONMENT AND PLANNING – consent – application to modify consent – condition of consent requiring payment of monetary contribution – power to reduce contribution – no change to development – contribution paid in full – calculation of contribution – construction of “gross floor area” – loading areas excluded – only loading areas in approved plans excluded – no utility in modification

[R.I.G. Consulting Pty Ltd v Queanbeyan-Palerang Regional Council \[2021\] NSWCA 130](#)

ENVIRONMENT AND PLANNING — consent — power to grant – subdivision – provision fixing development standard – minimum size of lots created by subdivision – proposed subdivision non-compliant – whether development standard applied to proposed subdivision – provision that consent not be granted for subdivision of “resulting lot” – proposed subdivision of a resulting lot – whether provision applied to proposed subdivision

Development applications

[KEPCO Bylong Australia Pty Ltd v Bylong Valley Protection Alliance Inc \[2021\] NSWCA 216](#)

ENVIRONMENT AND PLANNING – development application – refusal of consent – judicial review – State significant development – coal mine proposal – consent required from Independent Planning Commission – construction of Mining SEPP, cl 14 – conditions of development

[Omayo Investments Pty Ltd v Dean Street Holdings Pty Ltd \[2021\] NSWCA 2](#)

ENVIRONMENT AND PLANNING – development approval – variation of plans – formalities for approval of changes – whether requirement for written application – recording approval of certifying authority – notification of consent authority – effect of breach of regulations

Development consent

[Settlers Estate Pty Ltd v Penrith City Council \[2021\] NSWCA 13](#)

APPEAL – breach of development consent – construction certificate part of development consent – drainage line not constructed in location shown on construction certificate plan – construction of construction certificate plan – whether misconstruction – judicial notice – whether common knowledge – refusal of leave to reopen – whether denial of procedural fairness – whether incorrect factual or legal assumption – leave to appeal refused

[North Parramatta Residents' Action Group Inc v Infrastructure New South Wales \(No 2\) \[2021\] NSWCA 146](#)

ENVIRONMENT AND PLANNING – development consent – challenge to validity – whether environmental impact statement complied with Environmental Planning and Assessment Regulation cl 7(1)(c) – requirement to consider feasible alternative sites – requirement to consider feasible alternative designs

Enforcement proceedings

[Omayo Investments Pty Ltd v Dean Street Holdings Pty Ltd \[2021\] NSWCA 2](#)

ENVIRONMENT AND PLANNING – enforcement proceedings – construction certificate – variation of development – whether construction certificate modified – whether work undertaken before approval by certifying authority – failure to notify consent authority – whether development unlawful

Heritage conservation

[Carter v Mehmet \[2021\] NSWCA 286](#)

ENVIRONMENT AND PLANNING — heritage conservation — protection of Aboriginal heritage — *National Parks and Wildlife Act 1974* (NSW) — meaning of “Aboriginal object”

Jurisdiction

[Council of the City of Ryde v Azizi \[2021\] NSWCA 165](#)

COURTS – Land and Environment Court (NSW) – jurisdiction and powers – class 3 jurisdiction – assessment of value of land compulsorily acquired – enforcement of statutory obligation to pay 90% of Valuer General’s assessment pending resolution of claim – power to make freezing order

[Dincel Construction System Pty Ltd v Penrith City Council \[2021\] NSWCA 133](#)

ENVIRONMENT AND PLANNING – Court of Appeal – jurisdiction and powers – where appellants imported fill, engaged in earthworks, constructed hardstand areas and used land for storage without development consent – where appellants admitted breaches – where primary judge ordered cessation of use, removal of fill and restoration of premises – where primary judge suspended injunctive relief – whether *House v The King* error in granting injunctive relief established

Native title

[Lawson v Minister for Environment & Water \(SA\) \[2021\] NSWCA 6](#)

NATIVE TITLE – extinguishment – compensation – whether extinguishment occurred (i) under legislation vesting land in South Australia or (ii) pursuant to resumption under the *Public Works Act 1912* (NSW)

21. Equity

Breach of confidence

[Agha v Devine Real Estate Concord Pty Ltd & Ors \[2021\] NSWCA 29](#)

EQUITY — Breach of confidence — Concurrent confidentiality obligation in contract
EQUITY — Breach of confidence — Necessary quality of confidence — Employment

EQUITY — Breach of confidence — Necessary quality of confidence — Material in public domain

Contempt

[He v Sun \[2021\] NSWCA 95](#)

CONTEMPT – criminal contempt – where appellant engaged in conduct found to amount to a contumacious disregard of Court orders – where sentencing judge imposed a sentence of six weeks’ imprisonment – whether sentencing judge failed to consider possibility of suspending sentence for contempt – whether sentencing judge erred in failing to suspend the sentence – whether sentence was manifestly excessive.

SENTENCING – criminal contempt – where sentencing judge imposed a sentence of six weeks’ imprisonment – whether sentencing judge erred in failing to suspend the sentence – power to suspend a sentence for criminal contempt in the Supreme Court’s civil jurisdiction – whether sentence was manifestly excessive

Defences

[Mualim v Dzelme \[2021\] NSWCA 199](#)

EQUITY – defences – laches – knowledge of the wrong – where impugned share allotment occurred in 2004 – where director of company has since passed away – where appellants reside in Indonesia and speak minimal English – whether appellants had means of knowledge of the wrong – whether respondents pleaded that appellants could have searched public records and ran that defence below

Equitable compensation

[Ah Sam v Mortimer \[2021\] NSWCA 327](#)

EQUITY – Equitable remedies – Equitable compensation – Order setting aside agreement for unconscionability conditional upon party obtaining relief doing equity – Insufficient evidence of appellant’s expenditure on property or of enhancement to property’s value – Any entitlement offset by appellant’s rent-free enjoyment of property despite void agreement – No compensation payable

[Australian Executor Trustees \(SA\) Limited v Kerr \[2021\] NSWCA 5](#)

EQUITY – equitable remedies – equitable compensation – causation – whether award of equitable compensation should be limited to the value of the scheme land – where challenge to factual findings relating to Payout counterfactual – whether award of equitable compensation should be reduced by certain adjustments and deductions

EQUITY – equitable remedies – equitable compensation – whether defaulting trustee entitled to apportion loss to law firm – whether South Australian or New South Wales proportionate liability legislation applied – where South Australian law *lex loci delicti* – whether apportionment provisions procedural in nature or substantive

[Lambourne v Baker \[2021\] NSWCA 229](#)

EQUITY — equitable remedies — equitable compensation — availability — misappropriation of company funds by director — moneys applied for personal uses — recovery of moneys by company

Equitable interest in property

[IWC Industries Pty Ltd v Sergienko \[2021\] NSWCA 292](#)

EQUITY – equitable interests in real property – priorities – where property purchased by trustee on trust for sole unitholder – competing claims of beneficiary under trust and equitable mortgagee – where beneficiary did not pay any monies towards purchase price of property or “fully paid” units in unit trust – where beneficiary’s solicitor advised trustee was untrustworthy – where trust deed conferred wide powers on trustee, including power to mortgage trust assets for any contractual obligation – where trust deed precluded unitholder from lodging caveat against any trust property and no caveat was lodged – where equitable mortgage granted over property to respondent in breach of trust – whether merits of competing equities unequal – whether beneficiary’s prior interest postponed to subsequent interest of equitable mortgagee

EQUITY – equitable interests in real property – priorities – where unitholder issued “fully paid” units but no monies paid for units in trust or towards purchase of property – whether evidence that trustee borrowed funds for purchase of property – whether beneficiary has liability to trustee for units issued to it – whether beneficiary was a volunteer

Estoppel by representation

[Gill v Garrett \[2021\] NSWCA 117](#)

ESTOPPEL — estoppel by representation — detrimental reliance — whether terms of representation proved — whether claimant actually relied upon alleged representation

Exclusion of right

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

EQUITY – Contribution – Exclusion of right – Persons who have not paid just proportion of liability or not willing and able to do so not entitled to contribution – Two associates both

bankrupt and one deceased – No prospect of payment – Appellant as assignee not entitled to claim contribution

Fiduciary duties

[Boros v Pages Property Investments Pty Ltd \[2021\] NSWCA 288](#)

CORPORATIONS – directors and officers – fiduciary duties – duty to act in good faith in the best interests of company – duty not to use position as director or officer improperly – duty to ensure proper financial records kept – acting as director for two related entities – conflict of duty and interest

EQUITY – fiduciary duties – conflict of interest and duty – acting as director for two related companies – involvement in transactions between companies – director holding 25% shares of one company – where one company holds a financial interest in the other and consequently shares in any benefits received by the director – when director inherits and continues an existing and accepted practice as between the companies

[Gill v Garrett \[2021\] NSWCA 117](#)

EQUITY — fiduciary duties — unauthorised profit — bank cards and personal identification number entrusted for certain purposes — retention of excess cash for fiduciary’s personal use

[Jagatramka v Wollongong Coal Limited \[2021\] NSWCA 61](#)

CORPORATIONS – directors and officers – fiduciary duties – duty to act in good faith in the best interests of company and for proper purpose – where board resolved to purchase a property for “visiting executives” of the group – appellants were sole occupants of the property – whether the appellants were “visiting executives” for the purposes of the resolution of the board

EQUITY – fiduciary duties – fiduciary relationships – directors – conflict of interest and duty – no profit rule – whether the appellants improperly used their position as directors of the respondent to gain a benefit for themselves – whether the appellants intended to reside at the property on an exclusive, indefinite and continuous basis at the time of the resolution

[Lambourne v Baker \[2021\] NSWCA 229](#)

EQUITY — fiduciary duties — breach — rule in *Barnes v Addy* — whether evidence of breach by primary wrongdoer established

Injunctions

[Qantas Airways Ltd v Rohrlach \[2021\] NSWCA 48](#)

EQUITY – Injunctions – anti-anti-suit injunction – anti-suit injunction

Knowing assistants

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

EQUITY – Contribution – Exclusion of right – Knowing assistants – Persons with liabilities not of same nature and extent not entitled to contribution – Persons without clean hands not entitled to contribution – Previous High Court proceedings identified two associates as knowing assistants in dishonest breach of trust, with liability of potentially differing nature and extent – Appellant as assignee not entitled to claim contribution, let alone indemnity

Promissory estoppel

[Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd \(No 2\) \[2021\] NSWCA 93](#)

EQUITY – estoppel – promissory estoppel – general principles and maxims – equity will not permit detriment to be visited upon or remain with the party who has not been sufficiently clearly disabused of the counter-party's intended departure from the relevant assumption inducing reliance

ESTOPPEL – promissory estoppel – detrimental reliance – whether the principal discharged its duty to inform the contractor labouring under an assumption that the basis for that assumption had “materially changed” – where such material change must be communicated in sufficiently clear terms – where the relevant communication did not expressly refer to or address the topic of the assumption – where the principal was positively encouraging the contractor to complete outstanding works in respect of materials that the principal knew it had originally undertaken to supply itself

Proprietary estoppel

[Q \(a pseudonym\) v E Co \(a pseudonym\) \(No 2\) \[2021\] NSWCA 15](#)

ESTOPPEL – proprietary estoppel – where appeal against successful proprietary estoppel claim dismissed – where defendant now deceased – consequential orders

[Trentelman v The Owners – Strata Plan No 76700 \[2021\] NSWCA 242](#)

ESTOPPEL – proprietary estoppel – encouragement – nature of promise – strata title – promise of easement – whether representation sufficiently clear – where representation made at general meeting – where representation did not define the interest in property the

representee was expected to receive – where further documentation was required to be executed to give effect to the representation

ESTOPPEL – proprietary estoppel – encouragement – detrimental reliance – strata title – promise of easement – whether reliance was that of the owners corporation – *Strata Schemes Management Act 1996* (NSW) s 21(2) – *Strata Schemes Management Act 2015* (NSW) ss 8, 254

ESTOPPEL – proprietary estoppel – encouragement – detrimental reliance – strata title – promise of easement – whether the evidence indicated that the representation was such that the conduct of the lot holders was sufficiently influenced by the representation

Resulting trusts

[ET-China.com International Holdings Ltd v Cheung \[2021\] NSWCA 24](#)

TRUSTS – resulting trusts – whether presumption of a resulting trust over property transferred for nil consideration does not apply to personalty or shares

Specific performance

[AMA Group Limited v ASSK Investments Pty Limited \[2021\] NSWCA 45](#)

CONTRACT – contractual construction – whether promise in Binding Heads of Agreement (HOA) to enter into Business Sale Agreements was subject to a condition precedent, namely the approval of the Purchaser’s Board – whether consideration for HOA illusory – whether condition precedent permitted Purchaser’s Board to withhold approval capriciously – whether primary judge’s construction accorded with commercial common sense – whether primary judge erred in ordering specific performance of HOA

[Paolucci v Makedyn Pty Ltd \[2021\] NSWCA 215](#)

SPECIFIC PERFORMANCE – nature and availability of remedy – relevance of historic breach – need to establish not just for plaintiff to be confined to damages – damages under Supreme Court Act 1970 (NSW), s 68 (Lord Cairns’ Act) – nature and availability of remedy

Subrogation

[SIF Holdings Pty Ltd v CRC Gosford Pty Ltd \[2021\] NSWCA 174](#)

EQUITY – subrogation – requirements – whether the GLT Indemnity is a true indemnity against loss or merely a promise to pay on a contingency – not a true indemnity against loss

EQUITY – subrogation – rights of subrogated party – where subrogation is limited only to rights which diminish loss – no subrogation to right to receive Withdrawal Amount

Trusts and trustees

[Australian Executor Trustees \(SA\) Limited v Kerr \[2021\] NSWCA 5](#)

EQUITY – trusts and trustees – professional trustee company trustee – where beneficiary “covenantholders” invested money in forestry scheme – where covenantholders entitled to share in proceeds of sale of timber – where scheme land subject to encumbrances securing covenantholders’ interests – where encumbrances trust property – where scheme land and standing timber sold to third party – where trustee acted in breach of trust by releasing encumbrances

[Baba v Sheehan \[2021\] NSWCA 58](#)

EQUITY — trusts and trustees — trust powers — powers of appointment — powers of removal — fraud on a power — intention — whether power exercised for a foreign or extraneous purpose

[Chetwynd & Ors v Rose \[2021\] NSWCA 193](#)

EQUITY – Trusts and trustees – Express trusts – Declaration of trust – Where only evidence of trust was a conversation purported to have occurred 23 years before hearing – Where evidence inconsistent with later documentary evidence – No issue of principle

[El-Cheikh v Miraki \[2021\] NSWCA 271](#)

EQUITY — Trusts and trustees — Express trusts — Unit trusts — Where trust documents not correctly executed — Where no unit holders had subscribed for units — Whether trust constituted — Whether unit holders had a right to trust property if trust constituted — error of primary judge — Where trust constituted and unit holders acquired beneficial interest in trust property

[Ludwig v Jeffrey \(No 4\) \[2021\] NSWCA 256](#)

EQUITY — trusts and trustees — powers, duties, rights and liabilities — indemnity of trustee — whether trustee is entitled to be indemnified — where parties are joint tenants of a property — rights of trustees to be indemnified for defending proceedings brought against the trust — trustee entitlements to security for contingent liabilities

EQUITY — trusts and trustees — judicial advice — disagreement between trustee and beneficiaries regarding management of property — whether judicial advice should have been sought by the trustee pursuant to *Trustee Act 1925* (NSW), s 63 before defending the proceedings — consequences of a failure to seek judicial advice — if judicial advice had

been sought, the trustee would have been advised that defending the proceedings was appropriate — that a trustee “should” seek legal advice does not give rise to a legal obligation to do so

[Michel Fahmy Aziz Guirguis \(by his tutor Laila Guirguis\) v Oliga Aziz Girgis \[2021\] NSWCA 156](#)

EQUITY — Trusts and trustees — Resulting trusts — Purchase money trusts — Where appellant purchased properties in the name of the respondent pursuant to a power of attorney — Whether appellant contributed to the purchase price — Whether appellant manifested an intention inconsistent with beneficial ownership of properties — Where appellant provided to the respondent a will to sign which clearly acknowledged her ownership of the properties — Where appellant submitted tax returns on behalf of the respondent which were not trustee returns

[SIF Holdings Pty Ltd v CRC Gosford Pty Ltd \[2021\] NSWCA 174](#)

EQUITY – trusts and trustees – express trusts – construction – whether constitution of trust confers discretion on trustee to determine Distributable Income – whether trustee exercised discretion in determining the amount of Distributable Income

Unconscionable conduct

[Gill v Garrett \[2021\] NSWCA 117](#)

EQUITY — unconscionable conduct — special disability or disadvantage — whether unconscientious advantage taken

22. Evidence

Circumstantial evidence

[Jagatramka v Wollongong Coal Limited \[2021\] NSWCA 61](#)

EVIDENCE – circumstantial evidence – inferential reasoning – between two competing hypotheses – no direct evidence as to the appellants’ intention at the relevant time – where primary judge constrained to rely on events post-dating the material resolution – reasoning by way of “links in the chain” – whether such “links” made it reasonable to conclude on the balance of probabilities that the appellants had breached their fiduciary duties

Cross-examination

[Yebdoo v Holmewood \[2021\] NSWCA 119](#)

EVIDENCE – witness evidence – cross-examination – procedural fairness – *Browne v Dunn* – substance of the case allegedly not put to respondent in cross-examination – whether prior notice had nevertheless been given to respondent of

Exculpatory statements

[Franklin v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 83](#)

CRIMINAL LAW – evidence – exculpatory statement by accused to community corrections officer immediately after alleged assault – where statement recorded in Departmental record – whether hearsay – whether business record – where Magistrate excluded evidence as “self-serving” – where District Court refused leave to introduce evidence on appeal – whether admissibility of record raised a question of law alone

Expert evidence

[Di Liristi v Matautia Developments Pty Ltd \[2021\] NSWCA 328](#)

EVIDENCE – expert reports – where no orders made for service of expert reports – where both parties served expert reports late – where both parties had opportunity to cross-examine experts – whether “exceptional circumstances” for admitting expert report in reply served by respondent – Uniform Civil Procedure Rules 2005 (NSW), r 31.28(4) – whether primary judge erred in *House v The King* sense

[Manly Fast Ferry Pty Ltd v Wehbe \[2021\] NSWCA 67](#)

EVIDENCE – expert evidence – where competing medical evidence – whether primary judge substituted own medical opinion for that of the expert

[Mualim v Dzelme \[2021\] NSWCA 199](#)

EVIDENCE – expert evidence – whether letter from overseas lawyers in the nature of an investigative report was expert evidence – whether the primary judge erred in rejecting the tender of the evidence – whether the primary judge should have waived the rules of evidence – *Evidence Act 1995* (NSW), s 190

Further evidence on appeal

[Bangladesh Islamic Centre of NSW Inc v Elzamtar \[2021\] NSWCA 198](#)

APPEALS – application to receive further evidence – s 75A *Supreme Court Act 1970* (NSW) – whether “special grounds” established – special grounds not established because the further evidence could have been obtained with reasonable diligence for use at the trial and there is no significant prospect that the outcome at first instance would have been different if that evidence had been led at first instance

Hearsay

[Di Liristi v Matautia Developments Pty Ltd \[2021\] NSWCA 328](#)

EVIDENCE – admissibility – hearsay – business records exception, s 69 *Evidence Act 1995* (NSW) – where appellant/tenant introduced soil onto property alleged to be contaminated – where Council issued clean-up notice to respondent/landlord – where respondent commissioned expert report – where samples collected and tested by persons other than author of report – whether report business record of respondent – whether primary judge erred in giving weight to report

[Franklin v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 83](#)

CRIMINAL LAW – evidence – exculpatory statement by accused to community corrections officer immediately after alleged assault – where statement recorded in Departmental record – whether hearsay – whether business record – where Magistrate excluded evidence as “self-serving” – where District Court refused leave to introduce evidence on appeal – whether admissibility of record raised a question of law alone

[Maaz v Fullerton Property Pty Ltd \[2021\] NSWCA 79](#)

EVIDENCE – admissibility – hearsay – exceptions – business records – where business records of subcontractor tendered to prove unpaid debt – whether authenticity of document may be determined on the basis of inferences drawn from its form, contents or source – whether production on subpoena necessary – provenance and accuracy of the documents not challenged

Inferences

[Jagatramka v Wollongong Coal Limited \[2021\] NSWCA 61](#)

EVIDENCE – inferences – *Jones v Dunkel* – where neither of the appellants gave evidence at trial – court entitled to infer that their evidence would not have assisted their case – court not entitled to infer that the evidence would have been adverse to the appellants

Opinion evidence

[ELB Pty Ltd v Lumina BPO Pty Ltd \[2021\] NSWCA 91](#)

CONTRACT – written retainer of accountants – scope – whether primary judge erred in concluding retainer extended to all work for a client of an accounting and financial nature – opinion evidence – whether evidence of accounting partner that certain work “required” to complete task was opinion evidence – whether evidence was admissible as expert opinion – Held – primary judge correct – appeal dismissed

Standard of proof

[Gautam v Health Care Complaints Commission \[2021\] NSWCA 85](#)

EVIDENCE – standard of proof – civil cases – application of principles in *Briginshaw v Briginshaw*

[Jagatramka v Wollongong Coal Limited \[2021\] NSWCA 61](#)

EVIDENCE – standard of proof – the *Briginshaw* principle – where the nature of the breaches alleged amounted to serious wrongdoing on the appellants’ behalf

[Joshan v Pizza Pan Group Pty Ltd \[2021\] NSWCA 219](#)

EVIDENCE – standard of proof – civil cases – application for stay of proceedings under the *Service and Execution of Process Act 1992* (Cth) – whether applicant bears onus of proof – whether standard of proof is on the balance of probabilities – where primary judge applied the standard of a “clear and compelling basis” for the relief sought – whether *Rick Cobby Pty Ltd v Podesta Transport Pty Ltd* (1997) 139 FLR 54 was decided correctly

[Musa v Alzreaiawi \[2021\] NSWCA 12](#)

EVIDENCE – standard of proof – balance of probabilities – where appellant alleged signature on transfer form was forged – whether necessary to establish “clear and cogent proof” of the fraud – application of *Briginshaw v Briginshaw* – *Evidence Act 1995* (NSW), s 140

23. Gaming and wagering

Public lottery

[Renshaw v New South Wales Lotteries Corporation Pty Ltd \[2021\] NSWCA 41](#)

GAMING AND WAGERING – Public lottery – Applicant claiming to have entered winning numbers but unable to produce ticket – Substantial unclaimed prize from 1997 – Appeal from dismissal of claims – Appeal dismissed as incompetent

24. Insurance

Appeal from decision joining insurer to proceedings

[Avant Insurance Ltd v Burnie \[2021\] NSWCA 272](#)

INSURANCE – Appeal from decision joining insurer to proceedings – Whether there was an insured liability – Where insured gave no notice of facts that might give rise to claim – Whether contractual obligation to give notice – Whether breach of obligation cured by statute

Claims

[Cook v Sirius International Insurance Corporation Australian Branch \[2021\] NSWCA 192](#)

INSURANCE – Claims – Property insurance – Fire – Proof – Circumstantial case – Where insurers alleged that fires in hotel premises deliberately lit – Whether plausible hypotheses consistent with innocence – Relevance of financial motive – Whether means and opportunity – Passive infrared sensors – Timing – Layout of premises – Plausibility of intruders – Appeal dismissed

Construction of insurance contract

[Allianz Australia Insurance Limited v Rawson Homes Pty Ltd \[2021\] NSWCA 224](#)

CONTRACTS — Construction — Construction of insurance contract — Where policy insured against damage to construction projects — Where houses under construction damaged in hailstorm — Where policy provided for application of “deductible” — Whether “deductible” to be applied in respect of each house under construction, or whether to be applied only once to the total sum to be paid for damage caused by the hailstorm

Damages

[Worth v HDI Global Specialty SE \[2021\] NSWCA 185](#)

INSURANCE – where appellant’s house destroyed in a fire – where house used to operate a business – where house and business insured by respondent – where respondent granted conditional indemnity under deed of release – where respondent then denied liability on

basis fire deliberately lit by insured – whether primary judge erred in finding appellant deliberately started fire

INSURANCE – measure of indemnity – where lack of reasonable despatch in rectifying property – whether indemnity for property damage payable on reinstatement basis

INSURANCE – damages – whether damages available for consequential loss arising from insurer's breach of promise to indemnify – whether damages available for inconvenience and distress caused by breach

Non-disclosure and misrepresentation

[P & S Kauter Investments Pty Ltd v Arch Underwriting at Lloyds Ltd \[2021\] NSWCA 136](#)

INSURANCE – non-disclosure and misrepresentation – where dispute about extent of disclosure – whether non-disclosure entitling insurers to reduce liability to nil under *Insurance Contracts Act 1984* (Cth), s 28(3) – whether evidence that insurers would not have issued policy but for non-disclosure directed to undisclosed matters distributively or taken together

INSURANCE – non-disclosure and misrepresentation – where insurers seek to avoid policy for fraudulent misrepresentation under *Insurance Contracts Act 1984* (Cth), s 28(2) – whether fraudulent misrepresentations specifically pleaded – whether misrepresentations concerning matters of fact or statements of opinion

Professional indemnity policy

[P & S Kauter Investments Pty Ltd v Arch Underwriting at Lloyds Ltd \[2021\] NSWCA 136](#)

INSURANCE – professional indemnity insurance – claims made and notified policy – where insurers notified within policy period of “chance of a claim” by insured's clients for any loss “that may be incurred” – whether notification of “facts that might give rise to a claim” engaging *Insurance Contracts Act 1984* (Cth), s 40(3) – whether loss more than a potential possibility on notified facts

Requirement of proof to satisfaction of insurer

[MetLife Insurance Limited v Sandstrom \[2021\] NSWCA 123](#)

INSURANCE – claim by ex-police officer for total and permanent disability (“TPD”) payment – need to provide proof to satisfaction of insurer of TPD under policies – contractual obligations of insurer to assess claim in good faith and act fairly and reasonably – whether insurer breached contractual obligations – whether it was fair of insurer to rely on certain

medical opinions as adverse to claimant – whether insurer took into account written submissions of claimant – cumulative effect demonstrated a lack of overall fairness

25. Judgments and orders

Application to set aside or vary orders

[Choi v Commissioner of Police, New South Wales Police \(No 2\) \[2021\] NSWCA 290](#)

JUDGMENTS AND ORDERS – application to vary or set aside orders – application to amend judgment – application to amend catchwords – whether terms of catchwords justiciable

[Fuller v Albert \(No 2\) \[2021\] NSWCA 183](#)

JUDGMENTS AND ORDERS – amending, varying and setting aside – application to reopen appeal under UCPR r 36.16 – whether Court determined the appeal on a ground not pleaded at trial – whether Court found ordinarily implied general obligation in contract to cooperate – Court found particular contractual terms pleaded, the essence of which was cooperation to achieve stated purpose

[Johnston v The Greens NSW \(No 2\) \[2021\] NSWCA 291](#)

JUDGMENTS AND ORDERS – amending, varying, setting aside – application to set aside orders under UCPR rr 36.15, 36.16, 36.17 – no basis to set aside established – application dismissed

[Manhari Recycling Pty Ltd v Compass Global Holdings Pty Ltd \[2021\] NSWCA 252](#)

CIVIL PROCEDURE — default judgment — setting aside — where default judgment irregularly entered — whether applicants demonstrated bona fide defence on merits — default judgment set aside

[Mohareb v Kelso \(No 2\) \[2021\] NSWCA 182](#)

JUDGMENTS AND ORDERS – amending, varying and setting aside – motion under UCPR r 36.16 to set aside previous judgment of Court – judgment granted leave to appeal limited to specific issues – whether grant of leave should be extended to allow applicant to appeal against entire decision including costs order made by Registrar and reviewed by primary judge – no good reason to permit appellate challenge to costs order – costs order appears to have been appropriate in the circumstances

[Mohareb v Palmer \(No 3\) \[2021\] NSWCA 39](#)

JUDGMENT AND ORDERS – orders entered – application to vary orders – notice of motion not filed within 14-day period specified by rules – power to extend time – Uniform Civil Procedure Rules 2005 (NSW), r 36.16

[Oikos Constructions Pty Ltd t/as Lars Fischer Construction v Ostin & Anor \(No 2\) \[2021\] NSWCA 98](#)

JUDGMENTS AND ORDERS — Amending, varying and setting aside — Costs order of appeal — Effect of entering or recording — Where notice of motion is not filed within 14 days of judgment being entered — Uniform Civil Procedure Rules 2005 (NSW), r 36.16(3A) — Whether court can dispense with the rule — Civil Procedure Act 2005 (NSW), s 14 — Costs order not to be varied irrespective of whether there is power to do so

[Woodhouse v Fitzgerald \(No 2\) \[2021\] NSWCA 132](#)

APPEAL – post-judgment application to vary order – proposed order not sought at hearing – whether slip rule engaged – power to vary entered order

COSTS – appeal – post-judgment application to vary order – order as to costs of trial favourable to cross-appellant – order set aside – application to reinstate

PROCEDURE – variation of entered order – slip rule – whether “accidental slip or omission” – mistake by party – Uniform Civil Procedure Rules 2005 (NSW), r 36.17 – application to vary despite entry – Uniform Civil Procedure Rules 2005 (NSW), r 36.16 – whether prejudice to opposing party – order consented to at trial

[Zepinic v Health Care Complaints Commission \(No 3\) \[2021\] NSWCA 25](#)

JUDGMENTS AND ORDERS – second application to set aside previous judgment of Court refusing leave to appeal – as with first application, no basis for reopening established

Duty to give reasons

[Fuller v Albert \(No 2\) \[2021\] NSWCA 183](#)

JUDGMENTS AND ORDERS – reasons – duty to give reasons – whether Court gave adequate reasons in rejecting contentions of abandonment and unilateral release – matters relied on by parties referred to and rejected – reasons sufficiently explained conclusion reached – standard for reasons depends on nature of case, submissions and issues engaged

[Gibson v Director of Public Prosecutions \(NSW\) \(No 2\) \[2021\] NSWCA 218](#)

JUDGMENTS AND ORDERS – where no formal order was made by the primary judge dismissing the applicant’s request to state a case to the Court of Criminal Appeal – where no reasons were published by the primary judge for declining the applicant’s request – where applicant was advised of the primary judge’s refusal to state a case via an email from the Registrar of the Local Court – general requirement for judgments to be given in open court where practicable to do so – requirement for clarity as to when a judgment has been given – requirement that a judgment reaches the parties

[Prouten v Chapman \[2021\] NSWCA 207](#)

APPEALS – Procedural fairness – Failure to give reasons – Adequacy of reasons – Requisite standard of reasons for accepting and rejecting evidence and for making credit findings

Examination orders

[Melhem v Katter \[2021\] NSWCA 273](#)

JUDGMENTS AND ORDERS – Enforcement – Appeal from setting aside of examination orders – Where District Court had given two inconsistent judgments – Where Court of Appeal previously prohibited District Court from taking any further steps in proceedings on basis that second judgment was valid – Where District Court on remittal considered itself to be functus officio – Whether District Court entirely prohibited from taking any further steps in the proceedings – Court of Appeal only quashed second judgment – Court of Appeal only prohibited steps on basis of validity of second judgment – Distinction between adjudication and enforcement – Appeal allowed

Meaning of “judgment or order”

[Polsen v Harrison \[2021\] NSWCA 23](#)

APPEALS – jurisdiction – appeal from “judgment or order” – refusal of a recusal application – application for disqualification made orally without notice of motion – whether refusal was a “judgment or order”

WORDS AND PHRASES — “judgment or order” – “fair-minded lay observer”

Orders made in chambers

[C & E Critharis Constructions Pty Ltd v Cubic Metre Pty Ltd \(No 2\) \[2021\] NSWCA 60](#)

JUDGMENTS AND ORDERS – costs order made in chambers under special arrangements during the COVID-19 pandemic – whether order made “in the absence of a party” for the

purposes of r 36.16(2)(b) of the Uniform Civil Procedure Rules 2005 (NSW)

Open court

[Gibson v Director of Public Prosecutions \(NSW\) \(No 2\) \[2021\] NSWCA 218](#)

JUDGMENTS AND ORDERS – where no formal order was made by the primary judge dismissing the applicant’s request to state a case to the Court of Criminal Appeal – where no reasons were published by the primary judge for declining the applicant’s request – where applicant was advised of the primary judge’s refusal to state a case via an email from the Registrar of the Local Court – general requirement for judgments to be given in open court where practicable to do so – requirement for clarity as to when a judgment has been given – requirement that a judgment reaches the parties

Pre-Judgment Interest

[Great Northern Developments Pty Ltd v Lane \[2021\] NSWCA 150](#)

JUDGMENTS AND ORDERS – interest – pre-judgment interest – rate applicable – where respondent succeeded on restitutionary claim – whether it was open to the primary judge to select the same rate of interest agreed to by the parties – Civil Procedure Act 2005 (NSW), s 100

Precedent

[Secretary of the Department of Planning, Industry and Environment v Blacktown City Council \[2021\] NSWCA 145](#)

COURTS AND JUDGES – precedential value of decisions of Court of Appeal refusing leave to appeal.

Slip rule

[Woodhouse v Fitzgerald \(No 2\) \[2021\] NSWCA 132](#)

APPEAL – post-judgment application to vary order – proposed order not sought at hearing – whether slip rule engaged – power to vary entered order

COSTS – appeal – post-judgment application to vary order – order as to costs of trial favourable to cross-appellant – order set aside – application to reinstate

PROCEDURE – variation of entered order – slip rule – whether “accidental slip or omission” – mistake by party – Uniform Civil Procedure Rules 2005 (NSW), r 36.17 – application to vary despite entry – Uniform Civil Procedure Rules 2005 (NSW), r 36.16 – whether prejudice to opposing party – order consented to at trial

Stay of execution of writ for possession

[Arambatzis v Foundas \(No 2\) \[2021\] NSWCA 125](#)

JUDGMENTS AND ORDERS – Court of Appeal – Stay of execution of writ for possession – Further stay – Where little progress made since initial stay – Where pro bono referral unavailing – Where applicant did not have published reasons for judgment regarding previous stay – Where original document constituting fresh evidence with indicia of authenticity raising serious question of miscarriage of justice in decision below said to have been sent to Court – Stay extended – Where any further extension will require very prompt steps to progress proceedings

[Arambatzis v Foundas \(No 3\) \[2021\] NSWCA 189](#)

JUDGMENTS AND ORDERS – Court of Appeal – Extension of stay of execution of writ for possession – Extension not opposed – Extension granted and orders made with view to progressing matter to hearing

Variation of reasons due to change in circumstances

[Q \(a pseudonym\) v E Co \(a pseudonym\) \(No 2\) \[2021\] NSWCA 15](#)

JUDGMENTS AND ORDERS – variation of reasons – change in circumstances – where appellant died after delivery of reasons but before making of final orders – where proposed relief based on appellant’s expected remaining lifetime – whether to reopen appeal – whether to vary proposed relief on account of appellant’s death

26. Land law

Adverse possession

[Sidoti v Hardy \[2021\] NSWCA 105](#)

LAND LAW – Adverse possession – Actual possession – Old system title – Conversion to Torrens title – Limited title – Indefeasibility of title – Exceptions to indefeasibility – Where successful claim at trial in respect of adverse possession of small portion of a ‘dunny lane’ commencing before creation of limited folio – Whether statutory possessory application over

Torrens title land able to be made – Alternatively, whether adverse possession claims preserved at common law by reason of possession for any length of time commencing prior to creation of folio – Whether wrong description of parcel or boundaries in circumstances where adverse possessory claim inchoate but not crystallised at time of conversion – Appeal dismissed

Co-ownership

[Chetwynd & Ors v Rose \[2021\] NSWCA 193](#)

LAND LAW – Co-ownership – Rights between co-owners – Account – Where accounts showed beneficial co-owners paid “rent” to third beneficial co-owner – Where accounting secured a tax advantage for the third co-owner – Where no evidence that the accounting was intended to reflect payment of an occupation fee – Whether beneficial co-owners entitled to adjustment

Damages

[Di Liristi v Matautia Developments Pty Ltd \[2021\] NSWCA 328](#)

DAMAGES – damages awarded for costs of remediating land – where only evidence of quantum was two quotes obtained in preparation of proceedings – where quotes contained hearsay material – where no objection by appellant to admissibility of quotes at trial – where appellant self-represented at trial – whether primary judge erred in giving weight to quotes

DAMAGES – damages awarded for unpaid rent – where primary judge made declaration that lease validly terminated by respondent – where appellant remained in possession of property – where no termination order yet made by NCAT – whether residential tenancy agreement remained on foot – whether landlord’s remedy limited to loss of bargain damages

[PPK Willoughby Pty Ltd v Baird \[2021\] NSWCA 312](#)

DAMAGES – developer purchases land by tender – developer obliged to construct development as specified in masterplan – developer makes profit – solicitors acting for developer give misleading advice concerning whether land flood affected – developer incurs costs in persuading council to remove flood notation – developer sues solicitors, advances “no transaction” case and claims difference between purchase price and “true value” – consideration of “Potts v Miller” damages – significance of absence of market for land – significance of obligation to construct development – appeal dismissed

Indefeasibility of title

[Ippin Textiles Pty Ltd v Winau Aust Pty Ltd \[2021\] NSWCA 9](#)

LAND LAW – Torrens title – indefeasibility of title – fraudster procured execution and registration of mortgages purportedly on behalf of mortgagor – whether mortgages properly construed secure anything against the lands

LAND LAW – Torrens title – indefeasibility of title – effect of acknowledgment of receipt of payment in registered mortgage – acknowledgment prima facie evidence of receipt but must yield to the facts as proved – no advance actually made to mortgagor due to intervention of fraudster

LAND LAW – Torrens title – indefeasibility of title – whether an unregistered document can be incorporated by reference into a registered mortgage – existence of Special Condition in registered mortgage excluding unregistered document where void – unregistered document void due to fraud

Standard form contract for sale of land

[Alexakis v Wan \[2021\] NSWCA 172](#)

CONTRACT – 2018 edition Law Society of New South Wales standard form contract for sale of land – construction – where additional clause 38 provided for payment of deposit in two instalments – where clause 2.3 made time for payment of second instalment “essential” – where deadline for payment not a business day – whether time for payment extended to next business day by clause 21.5 – whether exception to application of clause 21.5 “in the case of clauses 2 and 3.2” engaged

Torrens title

[Almona Pty Ltd v Parklea Corporation Pty Ltd \[2021\] NSWCA 171](#)

LAND LAW – Torrens title – exceptions to indefeasibility – fraud by mortgagee exercising power of sale – bid-rigging where alleged collaborator later acquired share in successful purchaser – whether collusion established

[CEG Direct Securities Pty Ltd v Wang \[2021\] NSWCA 76](#)

LAND LAW – Torrens title – Indefeasibility of title – Effects of indefeasibility – Construction of third party mortgages – Where executed pursuant to forged Powers of Attorney – Identification of secured money – Where no money advanced to or at the request of mortgagors – Where no acknowledgement of receipt – Mortgages held to have secured no money – Appeal dismissed – Balance of matter remitted

[Sidoti v Hardy \[2021\] NSWCA 105](#)

LAND LAW – Adverse possession – Actual possession – Old system title – Conversion to Torrens title – Limited title – Indefeasibility of title – Exceptions to indefeasibility – Where successful claim at trial in respect of adverse possession of small portion of a ‘dunny lane’ commencing before creation of limited folio – Whether statutory possessory application over Torrens title land able to be made – Alternatively, whether adverse possession claims preserved at common law by reason of possession for any length of time commencing prior to creation of folio – Whether wrong description of parcel or boundaries in circumstances where adverse possessory claim inchoate but not crystallised at time of conversion – Appeal dismissed

[Ippin Textiles Pty Ltd v Winau Aust Pty Ltd \[2021\] NSWCA 9](#)

LAND LAW – Torrens title – indefeasibility of title – fraudster procured execution and registration of mortgages purportedly on behalf of mortgagor – whether mortgages properly construed secure anything against the lands

LAND LAW – Torrens title – indefeasibility of title – effect of acknowledgment of receipt of payment in registered mortgage – acknowledgment prima facie evidence of receipt but must yield to the facts as proved – no advance actually made to mortgagor due to intervention of fraudster

LAND LAW – Torrens title – indefeasibility of title – whether an unregistered document can be incorporated by reference into a registered mortgage – existence of Special Condition in registered mortgage excluding unregistered document where void – unregistered document void due to fraud

27. Legal practitioners

[Atanaskovic Hartnell v Birketu Pty Ltd \[2021\] NSWCA 201](#)

LEGAL PRACTITIONERS – solicitors – Court’s supervisory jurisdiction – recovery of fees – retainer to investigate dispute between client and third party arising from frauds committed by solicitors’ employee – actual conflict between solicitors’ personal interests and fiduciary duty to client – whether solicitors obtained fully informed consent to act – whether nature of conflict precluded reliance on consent

LEGAL PRACTITIONERS – solicitors – Court’s supervisory jurisdiction – undertaking not to charge fees for work done – whether undertaking given in a professional capacity – whether reliance, loss or consideration required to enforce undertaking – whether Court should prevent solicitors reneging on undertaking

[Council of the Law Society of New South Wales v Karimjee \[2021\] NSWCA 179](#)

LEGAL PRACTITIONERS – disciplinary proceedings – practitioner convicted of offence under s 319 of the *Crimes Act 1900* (NSW) – whether probably permanently unfit to practise – order removing name from roll

[Council of the Law Society of New South Wales v Leslie \[2021\] NSWCA 59](#)

OCCUPATIONS – Legal practitioners – Disciplinary proceedings – Removal of practitioner’s name from the roll – Having misappropriated trust money – Tribunal found respondent was probably not a fit and proper person to be an officer of the court and recommended removal from the roll – Appellant seeking an order that respondent’s name be removed from the roll

[Council of the New South Wales Bar Association v Siggins \[2021\] NSWCA 40](#)

LEGAL PRACTITIONERS – Court’s inherent jurisdiction to supervise and discipline legal practitioners – application for removal of barrister’s name from the roll of Australian lawyers maintained by the Supreme Court of New South Wales – where barrister practised principally in New South Wales for six years holding a practising certificate from Queensland – whether representations to the Queensland Bar Association as to the barrister’s principal place of practice were made dishonestly – whether barrister a fit and proper person to remain on the Supreme Court roll

CONSTITUTIONAL LAW – challenge by barrister to validity of certain provisions governing the legal profession in Tasmania and Queensland – where disciplinary proceedings against the barrister did not involve any allegation of breach of any of the impugned provisions – whether there is any “matter” arising under the Constitution in respect of the impugned provisions

CONSTITUTIONAL LAW – challenge to validity of certain provisions governing the legal profession in New South Wales or their application to the barrister – whether impugned provisions have any extra-territorial effect – whether s 117 of the Constitution operates to render the impugned provisions inapplicable to the barrister – whether impugned provisions invalid as contrary to s 92 of the Constitution – whether impugned provisions inconsistent with various provisions of the *Judiciary Act 1903* (Cth) – whether impugned provisions inconsistent with Chapter III of the Constitution as compromising the institutional integrity of Federal and State Courts

[DEJ v Council of the New South Wales Bar Association \[2021\] NSWCA 72](#)

LEGAL PRACTITIONERS – practising certificate subject to conditions relating to financial management and tax affairs – barrister contravened conditions – whether psychiatric disorder provided “reasonable excuse” to justify not treating contraventions as professional misconduct

LEGAL PRACTITIONERS – barrister made representations to Bar Council – Tribunal found that those representations knowingly false – whether open to Tribunal to make those findings – whether Court of Appeal in position to make findings determining issue

LEGAL PRACTITIONERS – barrister made representation as to future conduct namely that would sell property to discharge tax liabilities – where barrister acted contrary to representation – whether that conduct constituted professional misconduct

LEGAL PRACTITIONERS – finding of professional misconduct – whether barrister a fit and proper person to remain on Supreme Court roll of lawyers

[Hastwell v Legal Services Commissioner \[2021\] NSWCA 20](#)

ADMINISTRATIVE LAW – judicial review – decision of professional disciplinary authority – decision to discontinue inquiry into complaint – refusal of internal review of initial decision – review sought by complainant – availability of orders in nature of certiorari

APPEAL – application for leave to appeal from judgment in supervisory jurisdiction – review of decision of Legal Services Commissioner discontinuing inquiries into aspects of complaint – complaint as to disciplinary matter – whether complainant had any right or interest affected by decision

[Johnson v Firth \[2021\] NSWCA 237](#)

OCCUPATIONS – Legal practitioners – Solicitors – Professional negligence – Advising client – Whether solicitor settled motor accident insurance claim prematurely and at an undervalue – Whether solicitor entitled to rely on *Civil Liability Act 2002* (NSW), s 50 – Whether causation of loss established – Appeal dismissed

[Livers v Legal Services Commissioner \(No 2\) \[2021\] NSWCA 164](#)

COSTS — Civil and Administrative Tribunal — disciplinary proceedings — costs incurred by a lawyer in defending allegations of professional misconduct — application for payment of costs from the Public Purpose Fund following successful appeal — statutory requirement for the Court to be satisfied that the lawyer did not engage in unsatisfactory professional conduct or professional misconduct — where solicitor admitted professional misconduct but on a basis not alleged by the Legal Services Commissioner in the proceedings before the Tribunal — proper construction of sch 5, cl 23(3) of the *Civil and Administrative Tribunal Act*

[Muriniti v Mercia Financial Solutions Pty Ltd \[2021\] NSWCA 180](#)

APPEALS – appeal from primary judgment making personal costs orders against the applicant pursuant to Sch 2 of the Legal Profession Uniform Law Application Act 2014 (NSW) and s 99 of the Civil Procedure Act 2005 (NSW) – where applicant was the legal practitioner for the defendant in the proceedings below and made allegations of fraudulent misrepresentation and conspiracy without any proper basis – where solicitor breached his professional ethical duties in pursuing the claims

APPEALS – application for leave to appeal – whether leave to appeal is required by a legal practitioner who is subject to a third party costs order, assuming that the monetary threshold under s 101(2)(r) of the Supreme Court Act 1970 (NSW) is satisfied – leave to appeal not required pursuant to s 101(2)(c) of the Supreme Court Act on the basis that the decision was not one “as to costs only”

28. Limitation of Actions

Actions to recover land

[Sidoti v Hardy \[2021\] NSWCA 105](#)

LIMITATION OF ACTIONS – Actions to recover land – Adverse possession – Interaction of *Limitation Act 1969* (NSW), ss 27 and 65, with *Real Property Act 1900* (NSW), s 45C

Operation of bar

[Sydney Seaplanes Pty Ltd v Page \[2021\] NSWCA 204](#)

LIMITATION OF ACTIONS – operation of bar – action for compensation for death under s 5 of the *Civil Aviation (Carriers' Liability) Act 1967* (NSW) – where s 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) provides that the right to damages is extinguished if a party does not bring an action within two years of an aviation accident – characterisation of statutory bar – whether s 34 is a “limitation law” within the meaning of s 11(1) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) – where the law recognises a distinction between the barring of a right of action and its extinguishment

29. Local Government

Powers, functions and duties

[Mangoola Coal Operations Pty Limited v Muswellbrook Shire Council \[2021\] NSWCA 46](#)

LOCAL GOVERNMENT – powers, functions and duties – rates and charges – categorisation of land for rating purposes – re-categorisation by Council of farmland to mining land – relevance of impact of ongoing drought on cattle grazing – hiatus in activity on land different to abandonment – activity in rating years required to be considered in its context including what occurred previously on the land and what intended to occur after

LOCAL GOVERNMENT – powers, functions and duties – rates and charges – categorisation of land for rating purposes – easement burdening rateable land for benefit of adjacent mine – very small land area subject to easement and cattle grazing rights interrupted only to “trifling extent” – limited significance of easement to determination of dominant use of land

LOCAL GOVERNMENT – powers, functions and duties – rates and charges – categorisation of land for rating purposes – relevance of source of requirement to use land for a particular purpose – reason for existence relevant but not determinative – use of land as Aboriginal Cultural Heritage Offset and Habitat Enhancement Offset areas the antithesis of mining – offset areas not used “for a coal mine” under s 517 *Local Government Act* – consideration of *Peabody Pastoral Holdings* 211 LGERA 337

30. Medical practitioners

[EFQ \(a pseudonym\) v Medical Council of New South Wales \[2021\] NSWCA 167](#)

HEALTH – medical professionals – whether Medical Council of NSW had the power to impose a temporary condition that a practitioner not practise medicine – where such a power is found under s 150(1)(b) of the Health Practitioner Regulation National Law (NSW)

[Gautam v Health Care Complaints Commission \(No 1\) \[2021\] NSWCA 1](#)

PRACTICE AND PROCEDURE – appeal – stay – medical practitioner – finding of professional misconduct – order suspending registration – period of suspension likely to expire before appeal determined – appeal reasonably arguable – misconduct involved single incident three years before order made – order the suspension not commence for 30 days – no evidence of immediate risk to patients or parents

[Hampshire v Health Care Complaints Commission \[2021\] NSWCA 283](#)

PROFESSIONS AND TRADES – medical practitioners – challenge to finding of professional misconduct – where medical practitioner sent inappropriate text messages and voice messages to patient – where breach of health practice conditions limiting intake of alcohol and prescription medication – where conduct found to be unsatisfactory professional conduct – whether such conduct of “sufficiently serious nature” to warrant suspension or cancellation of registration – whether challenge to finding raises question of law

PROFESSIONS AND TRADES – medical practitioners – challenge to finding that not competent to practise – where medical practitioner admitted alcohol use disorder – where evidence that remission requires period of three years of abstinence – where medical practitioner not yet commenced period of abstinence – where alcohol dependence could grossly impair judgement and clinical ability – whether challenge to finding raises question of law

PROFESSIONS AND TRADES – medical practitioners – challenge to protective orders made by Tribunal cancelling medical practitioner’s registration – whether challenge involved question of law – where assertion that error of law in *House v The King* sense – whether Tribunal failed to consider effect of medical practitioner’s alcohol dependence – whether protective orders excessive – whether Tribunal failed to provide sufficient reasons

[Makaroff v Nepean Blue Mountains Local Health District \[2021\] NSWCA 107](#)

NEGLIGENCE — medical negligence — breach of duty — whether failure to advise the appellant that it was essential and urgent to organise orthopaedic review of injured shoulder constituted breach

NEGLIGENCE — medical negligence — peer professional opinion – *Civil Liability Act 2002* (NSW) s 5O – whether the respondents acted in a manner that was widely accepted by peer professional opinion as competent professional practice

NEGLIGENCE — medical negligence — causation — factual causation — whether it was more probable than not that the appellant would have had a better outcome but for the negligence — whether the appellant would have consulted an orthopaedic surgeon — whether the appellant would have undergone surgery prior to her shoulder injury becoming inoperable

[Medical Council of New South Wales v Smithson \[2021\] NSWCA 53](#)

ADMINISTRATIVE LAW — particular administrative bodies — NSW Civil and Administrative Tribunal — appeal under Health Practitioner Regulation National Law (NSW) s 159 against decision of Council under s 150 — hearing de novo — essential task of the Tribunal in such an appeal — error conceded — remittal of matter to the Tribunal

[Qasim v Medical Council of New South Wales \[2021\] NSWCA 173](#)

OCCUPATIONS — Medical practitioners — Qualifications and registration — Appeal — From dismissal of reinstatement application by NCAT — Whether appellant no longer suffering from mental impairment rendering her unfit to practise — Relevance of evidence of professional competence — Relevance of patient outcomes — Relevance of psychiatric evidence — Relevance of NCAT's own observations — Appeal dismissed

OCCUPATIONS — Medical practitioners — Qualifications and registration — Reinstatement application — Principles governing — Review body not permitted to review original deregistration decision

[Rahman v Health Care Complaints Commission \[2021\] NSWCA 247](#)

HEALTH — professional registration and discipline — unsatisfactory professional conduct — professional misconduct — inappropriate prescription of drugs of addiction— inadequate clinical records — continuing involvement in unproven therapies

HEALTH — professional registration and discipline — proportionality of disciplinary orders to misconduct — whether reprimand and conditions on registration sufficient to protect the public interest — whether orders were made in reliance on particulars not pleaded against the appellant

[Kirby v Health Care Complaints Commission \[2021\] NSWCA 139](#)

STATUTORY CONSTRUCTION — interpretation — Health Care Complaints Act 1993 (NSW) (HCC Act), s 4 — definition of “disciplinary body” — whether disciplinary body “established under” the Health Practitioner Regulation National Law 2009 (NSW) (National Law) — definition required to be read into HCC Act, s 90B — where Commission referred complaint to the Tribunal (NCAT) under the National Law, s 145C — where NCAT “established under” the National Law — whether NCAT authorised by the National Law to exercise the specified power of a disciplinary body in relation to a registered health practitioner

31. Mental Health

Community Treatment Order

[JK \(a pseudonym\) v St Vincent's Hospital Sydney Limited \[2021\] NSWCA 7](#)

MENTAL HEALTH – appeals – appeal from dismissal of application to lift Community Treatment Order while plaintiff prepares for hearing challenging order – application dismissed

Jurisdiction of Mental Health Review Tribunal

[JKL by his tutor Jennifer Thompson v Justice Health and Forensic Mental Health Network \[2021\] NSWCA 94](#)

COURTS AND TRIBUNALS – Mental Health Review Tribunal – whether Tribunal's power to transfer forensic patients into a mental health facility includes power to specify when transfer is to occur and to what particular mental health facility a patient is to be transferred to

MENTAL HEALTH – Mental Health Review Tribunal – jurisdiction – whether Mental Health Review Tribunal had power to order the transfer of a forensic patient to a mental health facility “when a bed becomes available” – whether the Tribunal took into account an irrelevant consideration when it had regard to the availability of beds at a specific mental health facility in the course of exercising its power to make a transfer order under s 48 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) – where the relevant statutory context supported considerations of “practicability” as being relevant to the exercise of the transfer power under s 48 of the Act

STATUTORY INTERPRETATION – jurisdiction – Mental Health Review Tribunal – whether Mental Health Review Tribunal had power to order the transfer of a forensic patient to a mental health facility “when a bed becomes available” – where the relevant statutory context supported considerations of “practicability” as being relevant to the exercise of the transfer power under s 48 of the Act.

STATUTORY INTERPRETATION – jurisdiction – Mental Health Review Tribunal – whether power to transfer a patient to or from a mental health facility includes power to specify when such a transfer should occur – implied incidental power – source of power – extent of implied incidental power

32. Occupations

Legal practitioners

[Council of the Law Society of New South Wales v Clifton \[2021\] NSWCA 340](#)

OCCUPATIONS – Legal practitioners – Solicitors – Removal from roll of solicitors – Recommendation by NCAT – Misuse of trust funds in the order of approximately \$50,000 – Dishonesty and professional misconduct admitted by respondent solicitor – Submitting appearance filed – Court not required to revisit, review, or rehear proceedings – Court nevertheless required to be independently satisfied that removal from roll appropriate – Court so satisfied – Removal from roll ordered

[Council of the New South Wales Bar Association v EFA \(a pseudonym\) \[2021\] NSWCA 339](#)

OCCUPATIONS – legal practitioners – barristers – misconduct and discipline – disciplinary proceedings – professional misconduct – where respondent is a practising barrister – respondent engaged in demeaning, humiliating and inexcusable conduct towards a female clerk at a dinner – New South Wales Civil and Administrative Tribunal found that the respondent had engaged in “unsatisfactory professional conduct” – respondent alleged to have said the words “suck my dick” to the female clerk – where immediate verbal complaint made by female clerk to a colleague – where the events of the dinner were recorded by closed circuit television cameras – where the Court was in as good a position as the Tribunal to determine questions of fact – whether the respondent said to H the words “suck my dick”

OCCUPATIONS – legal practitioners – barristers – misconduct and discipline – professional misconduct – where professional misconduct is defined in s 297 of the *Legal Profession Uniform Law* (NSW) – where that definition is expressed to be “inclusive” of the traditional definition of “professional misconduct” at common law – where the Court has inherent jurisdiction to supervise members of the legal profession in New South Wales – where the admission, suspension or removal of legal practitioners in exercise of that jurisdiction considers whether a person is a “fit and proper to engage in legal practice” – where the applicant contended that *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750 created a distinct category of “professional misconduct” at common law – whether there is a distinct category of professional misconduct at common law beyond that which is incorporated into s 297 of the *Legal Profession Uniform Law* (NSW)

OCCUPATIONS – legal practitioners – barristers – misconduct and discipline – professional misconduct – where s 297 of the *Legal Profession Uniform Law* (NSW) defines “professional misconduct” as including conduct “that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice” – where conduct that would justify a finding of unfitness is not necessarily conduct that must result in such a finding – where unfitness is not measured by the objective circumstances of the conduct alone but also by consideration of character – whether the respondent’s conduct would justify a finding that he was not a fit and proper person to engage in legal practice

OCCUPATIONS – legal practitioners – barristers – misconduct and discipline – professional misconduct – grounds for disciplinary orders – where respondent said the words “suck my dick” to a female clerk – where the respondent’s conduct and words warranted severe condemnation – where the Court has and will have no tolerance for conduct of legal practitioners that does not recognise and meet appropriate standards in respect of the treatment of women – where the objective of disciplinary orders is protective and not punitive – where the Tribunal found that the respondent’s conduct was an isolated instance of departure from accepted norms – where the respondent has suffered significant personal, emotional and financial cost as a result of his conduct – whether the Tribunal erred in its assessment of the seriousness of the respondent’s conduct by imposing only a formal reprimand

33. Partnerships

Fiduciary relationship

[Scrivener v Cappello \[2021\] NSWCA 330](#)

PARTNERSHIPS AND JOINT VENTURES – rights and duties between partners – fiduciary relationship – obligations – whether the appellant was an accessory to breaches of fiduciary obligations owed to the respondents – where the appellant caused the third respondent to fail to account to the second respondent for one half of the profits derived from the acquisition and subsequent sale of three contiguous parcels of land – where primary judge did not refer to two essential matters to establish accessorial liability under the second limb of *Barnes v Addy* – where the appellant knew of facts and circumstances which would indicate the fact of the breach on the part of a fiduciary to an honest and reasonable person

PARTNERSHIPS AND JOINT VENTURES – rights and duties between partners – fiduciary relationship – obligations – whether the appellant was liable to the first respondent or the second respondent

Liability of Partners

[Johnson v Mackinnon \[2021\] NSWCA 152](#)

PARTNERSHIPS AND JOINT VENTURES – Relationship of partners to persons dealing with them – Liabilities of partner – Partnership intended to be limited – Unlimited because limited partnership agreement never registered – Joint and several liability for misrepresentations made by other partner in ordinary course of business of partnership

Partnership property

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

PARTNERSHIPS AND JOINT VENTURES – Partnership property – Identification – Evidence that partnership has asset-owning and operating entities in Australia – Evidence in the form of engagement contracts, receipts, and Australian bank account

Rights and duties between partners

[Hopper v D J Sincock Pty Ltd \[2021\] NSWCA 305](#)

PARTNERSHIPS AND JOINT VENTURES – Rights and duties between partners – Implied authority to bind other partners by representations – Representations of freedom from liability made to departing partner – Representations not made to third party – Representations not made in ordinary course of business of partnership – No authority

[Scrivener v Cappello \[2021\] NSWCA 330](#)

PARTNERSHIPS AND JOINT VENTURES – rights and duties between partners – interpretation of agreement – oral agreement – where there was an agreement to enter into a partnership to acquire and resell three contiguous parcels of land and share expenses and profits equally – whether the agreement was subject to a sunset condition – where the first respondent’s evidence of oral agreement accepted – where the third respondent was a vehicle entrusted to hold assets on behalf of the partnership

34. Private international law

Anti-suit injunction

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

PRIVATE INTERNATIONAL LAW – Orders with extraterritorial effect – Anti-suit injunctions – Anti-suit injunction restraining claims previously determined and adverse findings previously made by arbitration in London – Interpretation of arbitral award – Majority of aspects of contribution claim covered – No error in finding that claim could only amount to USD\$2,000

Anti-anti suit injunction

[Qantas Airways Ltd v Rohrlach \[2021\] NSWCA 48](#)

PRIVATE INTERNATIONAL LAW – anti-anti-suit injunction – exclusive jurisdiction agreement – proper construction of scope of jurisdiction agreement – principles applicable to construction of jurisdiction agreements – relationship between jurisdiction agreement and choice of law clauses

Choice of law rules

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

PRIVATE INTERNATIONAL LAW – Applicable law – Choice of law rules – Partnerships – Place where partnership formed or carries on business – Partnership formed and operated in Kazakhstan – Partnership not governed by Australian law

Exclusive jurisdiction agreement

[Qantas Airways Ltd v Rohrlach \[2021\] NSWCA 48](#)

PRIVATE INTERNATIONAL LAW – anti-anti-suit injunction – exclusive jurisdiction agreement – proper construction of scope of jurisdiction agreement – principles applicable to construction of jurisdiction agreements – relationship between jurisdiction agreement and choice of law clauses

PRIVATE INTERNATIONAL LAW – concurrent proceedings in Singapore and New South Wales – whether New South Wales proceedings in relation to post employment restraints in

a Deed Poll should be stayed by reason of an exclusive jurisdiction clause in a separate Employment Agreement.

Foreign judgments and orders

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

PRIVATE INTERNATIONAL LAW – Foreign judgments and orders – Effect of recognition and enforcement – Whether English courts mandated consideration of partnership claim by Australian courts – English courts merely ordered case management stay in context of *lis pendens* – Judgments say nothing about jurisdiction or appropriateness of Australian courts

Inappropriate forum

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

PRIVATE INTERNATIONAL LAW – Non-exercise of jurisdiction – Inappropriate forum – Existence of real and substantial connection makes Australia an appropriate forum and negates inappropriate forum conclusion

Non-exercise of jurisdiction

[Joshan v Pizza Pan Group Pty Ltd \[2021\] NSWCA 219](#)

PRIVATE INTERNATIONAL LAW – jurisdiction – non-exercise of jurisdiction – stays under the *Service and Execution of Process Act 1992* (Cth) – jurisdiction clauses – non-exclusive jurisdiction clauses – whether excessive reliance placed upon non-exclusive jurisdiction clause in favour of New South Wales – where s 20(4)(d) of the *Service and Execution of Process Act 1992* (Cth) requires the court of issue to take into account “any agreement between the parties about the court or place in which the proceeding should be instituted” – whether dictum in *Asciano Services Pty Ltd v Australian Rail Track Corp Ltd* [2008] NSWSC 652 at [18] was correct

PRIVATE INTERNATIONAL LAW – jurisdiction – non-exercise of jurisdiction – stays under the *Service and Execution of Process Act 1992* (Cth) – standard of proof – whether applicant bears onus of proof – whether standard of proof is on the balance of probabilities – where primary judge applied the standard of a “clear and compelling basis” for the relief sought – whether *Rick Cobby Pty Ltd v Podesta Transport Pty Ltd* (1997) 139 FLR 54 was decided correctly

PRIVATE INTERNATIONAL LAW – jurisdiction – non-exercise of jurisdiction – stays under the *Service and Execution of Process Act 1992* (Cth) – where District Court of New South Wales was court of issue – whether South Australian court was “the appropriate court” to determine all the matters in issue between the parties – where the identification of all the matters in issue between the parties is a prerequisite to resolving the question of what is “the appropriate court”

Service outside of the jurisdiction

[Michael Wilson & Partners Ltd v Emmott \[2021\] NSWCA 315](#)

PRIVATE INTERNATIONAL LAW – Jurisdiction – Personal jurisdiction – Service outside of the jurisdiction – Partnership and contribution claims by corporate appellant as assignee of the rights of the trustees in bankruptcy of two former business associates of respondent – Respondent and two associates previously members of appellant firm operating in Kazakhstan but departed to establish competitor – Prior arbitration in London between appellant and respondent – Prior proceedings in Australia by appellant against two associates – Appeal from permanent stay of claims pursuant to rules for service outside of Australia

PRIVATE INTERNATIONAL LAW – Jurisdiction – Personal jurisdiction – Service outside of the jurisdiction – Connecting factors – Person outside of Australia a defendant to a claim for contribution or indemnity in respect of a liability enforceable by a proceeding in the court – Whether insufficient prospects of success to warrant service – Whether amount in issue only approximately USD\$2,000 – Whether any right of contribution – Appeal on contribution claim dismissed

PRIVATE INTERNATIONAL LAW – Jurisdiction – Personal jurisdiction – Service outside of the jurisdiction – Connecting factors – Whether partnership formed or carried on business in Australia – Whether partnership agreement governed by Australian law or enforceable or cognizable in an Australian court – Nothing to indicate satisfaction of such requirements – Leave to serve required

PRIVATE INTERNATIONAL LAW – Jurisdiction – Personal jurisdiction – Service outside of the jurisdiction – Leave to serve – Real and substantial connection – Previous proceedings in Australia resulting in partnership liability, bankruptcy events, unsigned consultancy agreements, citizenship, and litigation funding all insufficient – Existence of partnership assets in Australia – Partnerships can, and possibly only can, be wound up and accounts taken in Australia – Real and substantial connection established – Australia an appropriate forum – Leave to serve granted

35. Police

Police Regulation (Superannuation) Act 1906 (NSW)

[Day v SAS Trustee Corporation \[2021\] NSWCA 71](#)

EMPLOYMENT AND INDUSTRIAL LAW – public sector – police – *Police Regulation (Superannuation) Act 1906 (NSW)*, s 10B(2) – where primary judge found appellant incapacitated by transient condition for short period at time of resignation from police force – whether it follows that appellant incapable from infirmity of body or mind of exercising the functions of a police officer at that time – meaning of “infirmity” in *Police Regulation (Superannuation) Act*

36. Real Property

Conveyancing

[Carter v Mehmet \[2021\] NSWCA 286](#)

LAND LAW — conveyancing — contract for sale — defect in title — whether presence of Aboriginal objects on land constitutes defect in title — whether Aboriginal objects on land — whether presence of Aboriginal objects constituted defect in title where land already subject to development constraints

LAND LAW — conveyancing — contract for sale — termination in accordance with rule in *Flight v Booth* — whether presence of Aboriginal objects materially or substantially affected contract — no Aboriginal objects on land — no material or substantial effect

LAND LAW — conveyancing — contract for sale — requisitions — where requisitions based on plausible contention of presence of Aboriginal objects — whether purchasers' objections and requisitions on title properly made — whether vendors' responses sufficient

[Super Vision Resources Ltd v AC Holdings Co Pty Ltd \(No 2\) \[2021\] NSWCA 14](#)

CONVEYANCING – transfers in fraud of creditors – *Conveyancing Act 1919* (NSW), s 37A – where property transferred sold by transferee – where part of proceeds of sale used to pay legal costs of transferee subject to undertaking to repay if appeal allowed – consequential orders and declarations

Leases

[Case v Frimont \[2021\] NSWCA 30](#)

LANDLORD AND TENANT - residential tenancy agreement - long term occupation of land in unadministered deceased estate - whether appellant entered into residential tenancy agreement with uncle who was in residence and entitled to 5/9 of estate - whether residential tenancy agreement can be with "estate" of deceased - whether appellant entered into residential tenancy agreement, 8 years later, with newly appointed administrator of deceased estate - no error in primary judge's finding that no residential tenancy agreement entered into - appeal dismissed

[Di Liristi v Matautia Developments Pty Ltd \[2021\] NSWCA 163](#)

LEASES AND TENANCIES – *Residential Tenancies Act 2010* (NSW) – Termination – By landlord – Prohibition on recovery of possession – Whether prohibition deprives court of jurisdiction or is merely a defence

LEASES AND TENANCIES – *Residential Tenancies Act 2010* (NSW) – NSW Civil and Administrative Tribunal – Jurisdiction and powers – NCAT proceedings commenced by

respondent after appeal filed but prior to applicant notifying NCAT of appeal – Whether NCAT retains jurisdiction – Whether Court of Appeal can stay NCAT proceedings

Mortgages

[Almona Pty Ltd v Parklea Corporation Pty Ltd \[2021\] NSWCA 171](#)

MORTGAGES AND SECURITIES – mortgages – duties, rights and remedies of mortgagee – power of sale – mortgagee’s duty to exercise power of sale in good faith – effect of contract of sale upon mortgagor’s rights – whether attempt to refinance and discharge mortgage prior to transfer of title can prevent sale – where mortgagor’s attempts to refinance accelerated the sale process

MORTGAGES AND SECURITIES – mortgagee exercising right of sale – price higher if vacant possession given – requirement of vacant possession not communicated to occupant – damages awarded for failure to communicate occupation condition

LAND LAW – mortgages – mortgagee sale – where owner of the mortgagee financed the purchase and acquired option to control purchaser – honesty and independence of sale process – good faith exercise of power of sale – pre-existing relationship between parties acting on other projects – whether lack of independence in sale process indicative of fraud – burden of disproving fraud

[CEG Direct Securities Pty Ltd v Wang \[2021\] NSWCA 76](#)

MORTGAGES AND SECURITIES – Mortgages – Duties, rights and remedies of mortgagee – Possession

[Charlton v National Australia Bank Limited \[2021\] NSWCA 111](#)

MORTGAGES AND SECURITIES – debt owed under financial facilities – when liability for debt incurred – whether liability for debt only arises once debt becomes payable

MORTGAGES AND SECURITIES – proceedings for recovery of a debt secured by a mortgage – *Farm Debt Mediation Act 1994* (NSW) – whether mortgagor was the only relevant “farmer” – whether a “satisfactory mediation” was undertaken for the purpose of s 11

MORTGAGES AND SECURITIES – proceedings for recovery of a debt secured by a mortgage – *Farm Debt Mediation Act 1994* (NSW) – what constitutes “enforcement action” under s 10 – whether bank enforcing debt owed under financial facilities constituted “enforcement action”

[Fuller v Albert \[2021\] NSWCA 88](#)

MORTGAGES AND SECURITIES — mortgages — duties, rights and remedies of mortgagor — equity of redemption — mortgage over company share — contractual right to redemption extinguished on default — whether equitable right to redemption survived in spite of delay

[Sidoti v Hardy \[2021\] NSWCA 105](#)

MORTGAGES AND SECURITIES – Mortgages – Duties, rights and remedies of mortgagee – Right to notice of proceedings in which orders might be made affecting mortgagee’s interest – Where no notice given and no application by mortgagee to set aside orders below – Where application may not succeed – Where if successful, ultimate result unlikely to be different – Where impact on value of mortgagee’s security likely *de minimis* – Absence of notice not decisive of appeal

37. Sentencing

Intensive correction orders

[Stanley v Director of Public Prosecutions \(NSW\) \[2021\] NSWCA 337](#)

SENTENCING – penalties – intensive correction orders – proper approach to exercise of discretion – mandatory considerations – *Crimes (Sentencing Procedure) Act 1999* (NSW), s 66(2) – whether failure to conduct assessment contemplated by s 66(2) amounted to jurisdictional error – where community safety is paramount consideration in exercising the discretion to make intensive correction order

38. Statutory interpretation

Amending legislation

[Theoret v Aces Incorporated \[2021\] NSWCA 3](#)

STATUTORY INTERPRETATION — Amendment — where appellant’s entitlement to weekly workers compensation payments arose before but was not determined until after 2012 amendments to *Workers Compensation Act 1987* (NSW) came into force — whether s 82A of Act as currently in force entitles the appellant to have pre-injury average weekly earnings indexed historically from the time she first became eligible to receive weekly payments in respect of the relevant injury or only from the time the amendments came into force in 2012

'Anthony Hordern' principle

[Kassam v Hazzard; Henry v Hazzard \[2021\] NSWCA 299](#)

STATUTORY INTERPRETATION – *Anthony Hordern* principle – where multiple sources of power in a statute – where some sources of power expressly qualified – *Public Health Act 2010* (NSW), ss 7 and 8– whether the same source of power as s 7(2) – where s 7(3) expressly authorised limitation of freedom of movement – where power in s 7(3) expressed “without limiting s 7(2)” – whether the specific power in s 7(3) expressly qualified the general power in s 7(2)

Context

[Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 \[2021\] NSWCA 162](#)

STATUTORY INTERPRETATION – text, context and purpose of provisions and the mischief they are intended to remedy – *Strata Schemes Management Act 1996* (NSW) – *Strata Schemes Management Amendment Act 2002* (NSW) – *Strata Schemes Management Act 2015* (NSW) – extrinsic material – where purpose of relevant provisions emerges from the Second Reading Speech – savings provisions – *Interpretation Act 1987* (NSW) s 30

[North Parramatta Residents' Action Group Inc v Infrastructure New South Wales \(No 2\) \[2021\] NSWCA 146](#)

ENVIRONMENT AND PLANNING – meaning of “feasible alternatives” – requirement for competitive design process – scope of alternative designs – Parramatta Local Environmental Plan, cl 7.10

[Sydney Seaplanes Pty Ltd v Page \[2021\] NSWCA 204](#)

STATUTORY INTERPRETATION – contextual approach – context to be considered in the first order – context understood in a broad sense – including the existing state of the law, legislative purpose, legislative history and extrinsic materials

Defined terms

[Council of the New South Wales Bar Association v EFA \(a pseudonym\) \[2021\] NSWCA 339](#)

STATUTORY INTERPRETATION – definitions – “means” and “includes” – definition of “professional misconduct” in *Legal Profession Uniform Law (NSW)*, s 297 – where that section was intended to incorporate “the traditional common law definition” of professional misconduct

Departure from literal meaning

[Kirby v Health Care Complaints Commission \[2021\] NSWCA 139](#)

STATUTORY CONSTRUCTION – interpretation – Health Care Complaints Act 1993 (NSW) (HCC Act), s 4 – definition of “disciplinary body” – whether disciplinary body “established under” the Health Practitioner Regulation National Law 2009 (NSW) (National Law) – definition required to be read into HCC Act, s 90B – where Commission referred complaint to the Tribunal (NCAT) under the National Law, s 145C – where NCAT “established under” the National Law – whether NCAT authorised by the National Law to exercise the specified power of a disciplinary body in relation to a registered health practitioner

STATUTORY CONSTRUCTION – interpretation – HCC Act, s 90B – National Law, s 145C – interaction between HCC Act and National Law – where Director of Proceedings determined that the Commission should prosecute complaint before the Tribunal – whether Director of Proceedings acting ultra vires – whether distinction between Commission “prosecuting” the complaint before a disciplinary body and referring the complaint to the Tribunal

[Sydney Seaplanes Pty Ltd v Page \[2021\] NSWCA 204](#)

STATUTORY INTERPRETATION – departure from literal meaning – where literal reading of “relevant order” in s 11(1) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) does not conform to the legislative purpose – where purpose determined by reference to immediate context and extrinsic materials

Legislative purpose

[Kassam v Hazzard; Henry v Hazzard \[2021\] NSWCA 299](#)

STATUTORY INTERPRETATION – legislative purpose – *Public Health Act 2010* (NSW) – statement of objects – where purpose of Act is to promote, protect and improve public health including by the prevention of the spread of infectious diseases – where s 7 of the Act expressly contemplates the limitation of freedom of movement to address a public health risk

[Lawson v Minister for Environment & Water \(SA\) \[2021\] NSWCA 6](#)

STATUTORY INTERPRETATION – legislative purpose – whether land vested in South Australia for an estate in fee simple under the *River Murray Waters Act 1915* (NSW) – right to compensation under the *Public Works Act 1912* (NSW) – whether possessory title and any other interests extinguished

[Kirby v Health Care Complaints Commission \[2021\] NSWCA 139](#)

STATUTORY CONSTRUCTION – interpretation – Health Care Complaints Act 1993 (NSW) (HCC Act), s 4 – definition of “disciplinary body” – whether disciplinary body “established under” the Health Practitioner Regulation National Law 2009 (NSW) (National Law) – definition required to be read into HCC Act, s 90B – where Commission referred complaint to the Tribunal (NCAT) under the National Law, s 145C – where NCAT “established under” the National Law – whether NCAT authorised by the National Law to exercise the specified power of a disciplinary body in relation to a registered health practitioner

STATUTORY CONSTRUCTION – interpretation – HCC Act, s 90B – National Law, s 145C – interaction between HCC Act and National Law – where Director of Proceedings determined that the Commission should prosecute complaint before the Tribunal – whether Director of Proceedings acting ultra vires – whether distinction between Commission “prosecuting” the complaint before a disciplinary body and referring the complaint to the Tribunal

[Sydney Seaplanes Pty Ltd v Page \[2021\] NSWCA 204](#)

STATUTORY INTERPRETATION – legislative purpose – remedial legislation – where statute passed to remedy the effect of the decision of the High Court of Australia in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; [1999] HCA 27 – whether “want of jurisdiction” in s 11(1) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) refers to the conferral of jurisdiction held to be invalid by the High Court

Literal approach

[In the Matter of Richards Contracting Co Management Pty Ltd \[2021\] NSWCA 34](#)

STATUTORY INTERPRETATION – literal meaning – natural and ordinary meaning – Workers Compensation Act 1987 (NSW), s 236 – entitlement to payment

[Lawson v Minister for Environment & Water \(SA\) \[2021\] NSWCA 6](#)

STATUTORY INTERPRETATION – approaches – whether literal reading appropriate – whether a particular construction would be contrary to the purpose of an Act

Principle of legality

[Kassam v Hazzard; Henry v Hazzard \[2021\] NSWCA 299](#)

HUMAN RIGHTS – legislation – *Public Health Act 2010* (NSW), s 7 – principle of legality – where s 7 of the *Public Health Act 2010* (NSW) expressly contemplates and authorises the impairment of freedom of movement for protection against public health risks – whether certain public health orders made during the COVID-19 pandemic interfered with rights – whether those rights recognised by the common law – right to bodily integrity – right to earn a living – right not to be discriminated against – right to privacy – privilege against self-incrimination – right to silence

STATUTORY INTERPRETATION – principle of legality – common law rights and freedoms – where s 7 of the *Public Health Act 2010* (NSW) expressly contemplates and authorises the impairment of freedom of movement for protection against public health risks – right to bodily integrity – right to earn a living – right not to be discriminated against – right to privacy – privilege against self-incrimination – right to silence – whether any of those rights are recognised at common law – if so, whether they are “fundamental rights” – whether the Public Health (COVID-19 Additional Restrictions for Delta Outbreak) Order (No 2) 2021 (NSW), the Public Health (COVID-19 Vaccination of Education and Care Workers) Order 2021 (NSW) and/or the Public Health (COVID-19 Aged Care Facilities) Order 2021 (NSW) interfered with any of those rights – whether the principle of legality operated to constrain any interference with those rights

Repealed statutes

[In the Matter of Richards Contracting Co Management Pty Ltd \[2021\] NSWCA 34](#)

STATUTORY INTERPRETATION – amendment and repeal – references to repealed statute – deregistered company – where legislation providing power to reinstate company repealed – Companies (New South Wales) Code (NSW), s 459(6) – whether court has power to reinstate company

STATUTORY INTERPRETATION – amendment and repeal – references to repealed statute – Corporations (New South Wales) Act 1990 (NSW), s 85 – whether section of its own force can render applicable repealed co-operative scheme law – where section is not a deeming provision

STATUTORY INTERPRETATION – amendment and repeal – references to repealed statute – accrued statutory rights – Interpretation Act 1987 (NSW), s 30(1)(c) – nature of the rights – Companies (New South Wales) Code 1981 (NSW), s 459(6) – right to seek reinstatement – more than mere locus standi – where person aggrieved – where interests affected by the exercise of the right

Use of extrinsic materials

[Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111 \[2021\] NSWCA 162](#)

STATUTORY INTERPRETATION – text, context and purpose of provisions and the mischief they are intended to remedy – *Strata Schemes Management Act 1996* (NSW) – *Strata Schemes Management Amendment Act 2002* (NSW) – *Strata Schemes Management Act 2015* (NSW) – extrinsic material – where purpose of relevant provisions emerges from the Second Reading Speech – savings provisions – *Interpretation Act 1987* (NSW) s 30

[Sidoti v Hardy \[2021\] NSWCA 105](#)

STATUTORY INTERPRETATION – Interpretation of *Real Property Act 1900* (NSW) – Extrinsic materials – Explanatory memoranda and notes – Legislative history – Registrar-General’s guidelines – Second reading speeches

39. Succession

Contested probate

[Lewis v Lewis \[2021\] NSWCA 168](#)

SUCCESSION – contested probate – knowledge and approval – suspicious circumstances - significance of reading out will to capable testator – whether reading out will to capable testator who executes it will discharge onus on propounder – whether sufficient to establish knowledge of contents of will or whether it may be necessary to establish knowledge of its effect – consideration of *Tobin v Ezekiel* (2012) 83 NSWLR 757; [2012] NSWCA 285 – consideration of “mistake doctrine” – significance of statutory power to rectify wills

SUCCESSION – contested probate – severance of testamentary instruments – power to admit only those clauses to probate of which testator has been shown to have known and approved – distinction between omitted clauses which confer bequests and omitted clauses which confer power – *Osborne v Smith* (1960) 105 CLR 153; [1960] HCA 89 considered and explained

Family provision

[Bassett v Bassett \[2021\] NSWCA 320](#)

SUCCESSION – Family provision – claim by adult son for provision from the deceased’s estate pursuant to s 59 of the *Succession Act 2006* (NSW) – where primary judge erred in her conclusion that adequate provision had not been made for the adult son’s proper maintenance and advancement in life – where adult son had remained on farming land but had received earlier significant benefits from his parents recognised as an “early inheritance”

– extent to which anticipated adverse costs liability from non family provision claim should affect analysis of adequate provision

[Cooper v Atkin \[2021\] NSWCA 82](#)

SUCCESSION – family provision – claim by adult step-child of the deceased for provision under Ch 3 of the *Succession Act 2006* (NSW) – whether primary judge did not make an order for provision in the applicant’s favour by reason of disentitling conduct – no question of principle

[Gill v Garrett \[2021\] NSWCA 117](#)

SUCCESSION — family provision — claim by member of household for provision from the deceased’s estate under *Succession Act 2006* (NSW), Ch 3 — whether factors warranting —provision of household care to deceased — conscious misuse of special disadvantage of deceased — significance of reliance upon alleged agreement to leave real estate in will

[Grant v Grant \[2021\] NSWCA 181](#)

SUCCESSION — Claim by estate to recover property — Where property of deceased transferred by deceased’s daughter by way of gift in favour of deceased’s granddaughter in exercise of power of attorney — Where no power of gift conferred on attorney — Where daughter purportedly acted pursuant to direction in letter — Whether deceased’s signature was forged

SUCCESSION — Family provision — Claim by adult child — Where evidence of ill treatment of testatrix by claimant — Where evidence that claimant received substantial benefits from testatrix before death

[Yesilhat v Calokerinos \[2021\] NSWCA 110](#)

SUCCESSION – family provision – claim by alleged long-term partner of deceased – whether alleged partner an “eligible person” – whether de facto relationship, close personal relationship or dependent household member relationship – *Succession Act* ss 57(1)(b), (e), and (f) – requirement of “living” together and need for some common residence

Substitute for specific devise

[Wardy v NSW Trustee and Guardian \[2021\] NSWCA 121](#)

SUCCESSION – appropriate substitute for specific devise – property subject of specific devise sold by administrator to pay debt – need to put specific devisees in materially the same position that they would have been in if the sale had not occurred – how rights of

beneficiaries should be adjusted –whether substitution of specific property from residuary real estate appropriate – need for equivalence in value

Trusts and trustees

[Wardy v NSW Trustee and Guardian \[2021\] NSWCA 121](#)

SUCCESSION – trusts and trustees – judicial advice, *Trustee Act 1925* (NSW), s 63 – whether judicial advice given – parties concurred in primary judge himself determining the issue of what adjustment of the rights of the beneficiaries should be made – broad powers of the Court under UCPR r 54.3

40. Summary offences

Where applicant's claim summarily dismissed on ground that statute-barred

[Mclaughlin v Burrows \[2021\] NSWCA 170](#)

APPEAL – leave to appeal – where applicant's claims summarily dismissed on ground that statute-barred – whether primary judge erred in being satisfied that there was no arguable case that applicant was under a “disability” within meaning of *Limitation Act 1969* (NSW) s 52(1)

41. Taxation

Land tax

[Chief Commissioner of State Revenue v McIntosh Bros Pty Ltd \(in liq\) \[2021\] NSWCA 221](#)

TAXES AND DUTIES – land tax – exemption – land used for primary production – where independent users conduct separate primary production activities on land – whether each activity relevant to determine if dominant use of land is for primary production – whether uses can be considered as a whole to determine if exemption applies – whether primary production business conducted on other land relevant to determining commercial character of activities on subject land

42. Torts (negligence)

Apportionment of responsibility

[Owners of Strata Plan No 30791 v Southern Cross Constructions \(ACT\) Pty Ltd \(in liquidation\) \(No 2\) \[2021\] NSWCA 35](#)

TORTS — negligence — apportionment of responsibility and damages — adjustment to reflect concurrent wrongdoing by entity not party to proceeding

[Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd \[2021\] NSWCA 206](#)

TORTS – damage to property – whether liability apportionable – concurrent wrongdoers – whether acting independently of each other – *Civil Liability Act 2003* (Qld) s 30

[Woodhouse v Fitzgerald \[2021\] NSWCA 54](#)

TORTS – property damage – apportionable claim – concurrent wrongdoers – whether a party with statutory immunity can be a concurrent wrongdoer

[Johnson v Mackinnon \[2021\] NSWCA 152](#)

TORTS – Joint and several liability – Apportionment – Primary judge disallowed late attempt to raise apportionment defence – Disallowance denied a real prospect of significant reduction in liability – Strongly arguable error in disallowance – Unnecessary to consider further as respondent nevertheless able to rely on non-apportionable claim in deceit

Breach of duty of care

[Nestlé Australia Ltd v Metri \[2021\] NSWCA 303](#)

NEGLIGENCE – breach – risk of harm – identification of risk – risk of forklift operator being dislodged while forklift in motion – risk of harm foreseeable

NEGLIGENCE – breach – reasonable precautions against risk of harm – whether reasonable person in appellant's position would have taken precautions – failure to fit forklift with seatbelt or other restraint – failure to establish adequate system for communicating defects to enable diagnosis and repair

[Old v Minter \[2021\] NSWCA 92](#)

NEGLIGENCE – duty of care – breach – standard of care – professional negligence – whether reasonable to leave medical hardware *in situ* after the injury had healed – differing opinions of orthopaedic surgeons – reliance on infectious diseases experts

[Prouten v Chapman \[2021\] NSWCA 207](#)

NEGLIGENCE – Duty of care – Particular relationships – Users of public right of passage – Duty owed to postal delivery officer by owners of caravan parked on nature strip – Formulation of risk – Where postal delivery officer claimed to have collided with concealed extender bed protruding from caravan – Presence of caravan insufficient – Risk arising specifically from concealed extender bed – Formulation must account for driver taking reasonable care for own safety

NEGLIGENCE – Breach – Whether risk foreseeable – Whether risk not insignificant – Whether reasonable person would have taken precautions – Probability of harm – Seriousness of harm – Burden of taking precautions – Where limited or no social utility of activity creating risk – Where a reasonable response was to do nothing – Breach not established – Appeal dismissed

[Woodhouse v Fitzgerald \[2021\] NSWCA 54](#)

TORTS – negligence – duty of care – scope of duty of landowner to neighbouring landowner for fire – vicarious liability – non-delegable duty – controlled burn by Rural Fire Service on private land – reignition and spread of undetected fire – damage to neighbouring property – RFS with statutory immunity to liability – RFS exercised reasonable care – whether landowner liable

[Yebdoo v Holmewood \[2021\] NSWCA 119](#)

NEGLIGENCE – breach of duty – motor vehicle accident – failure to keep a proper lookout and slow vehicle

[JFIT Holdings Pty Ltd t/as New Dimensions Health & Fitness v Powell \[2021\] NSWCA 137](#)

NEGLIGENCE – duty of care – formulation of risk – whether formulation too narrow – formulation focussed purely and precisely on the circumstances in which injury suffered – more generalised formulation would not have affected outcome

NEGLIGENCE – breach – whether risk of harm “not insignificant” – common knowledge that lifting heavy weights from floor level can cause back injury – obvious that leaving weights littering floor of gymnasium would force others to put them away – whether reasonable person would have taken precaution of implementing system of inspecting weights area – constant supervision not required – no reason why staff could not be present during limited problematic period to enforce rules about putting weights away after use

[Wollongong City Council v Williams \[2021\] NSWCA 140](#)

TORTS — Negligence — Appellant injured as a result of falling on the first step on a stepped path in a park — Whether the primary judge erred in finding that the appellant had breached the duty of care which it owed to the respondent — Primary judge found the respondent to be a witness of credit who maintained that he was taking care and was not distracted — Experts agreed that single steps presented a hazard — Primary judge was not in error in finding that the appellant failed to take reasonable precautions against the risk of harm and was negligent — Appeal dismissed

Causation

[Dungan v Padash \[2021\] NSWCA 66](#)

NEGLIGENCE — Causation — Motor vehicle accident — Where plaintiff diagnosed with adjustment disorder secondary to back injury caused by accident — Where back injury consisted in the aggravation of existing degenerative changes — Whether psychiatric injury remained causally related to the accident even after physical restrictions attributable to the accident subsided

[Johnson v Firth \[2021\] NSWCA 237](#)

NEGLIGENCE – Causation – Factual causation – Whether client would have accepted offer even if given proper advice – Competing expert opinions – Where accepted offer was slightly above mid-range of potential outcomes – Where client in precarious financial position – Where clear willingness to settle – Where risk of future disclosure of information adverse to claim – Causation not established

[Nestlé Australia Ltd v Metri \[2021\] NSWCA 303](#)

NEGLIGENCE – factual causation – whether failure to communicate defect caused harm suffered by plaintiff – causation established

[Old v Minter \[2021\] NSWCA 92](#)

NEGLIGENCE – causation – medical negligence – later infection where medical hardware left *in situ* after earlier operation – whether later operation would have been required but for the foreign material – conclusion not dependent on whether infection caused by organisms present when first operation undertaken

[Queensland Bulk Water Supply Authority t/as Segwater v Rodriguez & Sons Pty Ltd \[2021\] NSWCA 206](#)

NEGLIGENCE – causation – factual causation – cumulative effect of sequential breaches – series of acts jointly sufficient to cause harm – division of single course of conduct into discrete breaches artificial

[JFIT Holdings Pty Ltd t/as New Dimensions Health & Fitness v Powell \[2021\] NSWCA 137](#)

NEGLIGENCE – causation – whether factual causation established – gymnasium member injured when lifting heavy weight from floor level – not within member’s exercise regime – member clearing floor to allow her to exercise – injury due to failure of gymnasium to enforce its own rules

Contributory negligence

[Mount Arthur Coal Pty Ltd v Duffin \[2021\] NSWCA 49](#)

TORTS – general principles – contributory negligence – where respondent injured while driving a grader on a coal mine haul road after rain event at night – where respondent hit a lamination in the road – where other employees using the area had failed to notice hole in the road – whether respondent guilty of contributory negligence

[Yebdoo v Holmewood \[2021\] NSWCA 119](#)

NEGLIGENCE – causation – factual causation – motor vehicle accident – whether expert opinion was necessary to establish causation – whether evidence of time and distance was too imprecise to support a finding of causation

[Wollongong City Council v Williams \[2021\] NSWCA 140](#)

NEGLIGENCE — Cross Appeal — Damages — Challenged findings of contributory negligence and discount of damages for past economic loss — Primary judge concluded that contributory negligence was established — Finding of contributory negligence not contradicted by the finding of liability — No want of reasonable care on the part of the respondent that might have contributed to his failure to perceive the steps — Primary judge reduced the appellant’s damages for past economic loss by 10% to allow for circumstances in the respondent’s circumstances that would have caused him to retire earlier — Where primary judge made no express finding on the degree of probability that the respondent would have retired before 66 — Evidence accepted by the primary judge contradicted the prospect of early retirement — The discount of 10% was inconsistent with the positive findings of the primary judge — Cross-appeal allowed

Damages

[Hoblos v Alexakis \[2021\] NSWCA 126](#)

TORTS – General principles – Damages – Where task of assessing evidence of major depressive disorder complicated by evidence of exaggeration or malingering – Whether plaintiff entitled to any damages

[Manly Fast Ferry Pty Ltd v Wehbe \[2021\] NSWCA 67](#)

DAMAGES – assessment of damages in tort – personal injury – where respondent suffered injury to left knee when ferry collided with wharf – whether respondent suffered compensatory injury to right knee by favouring left – whether primary judge erred in awarding damages for injury to respondent's right knee

DAMAGES – assessment of damages in tort – personal injury – where respondent could no longer perform certain house maintenance tasks – where those tasks carried out by respondent's brothers – whether primary judge erred in awarding respondent damages for commercial domestic assistance

[Mount Arthur Coal Pty Ltd v Duffin \[2021\] NSWCA 49](#)

NEGLIGENCE – damages – personal injury damages – future attendant care – future economic loss – out of pocket expenses – where primary judge did not make deduction for vicissitudes for future medical expenses or future attendant care – whether appropriate to account for respondent's pre-existing conditions when awarding future out of pocket expenses and costs of future attendant care

NEGLIGENCE – damages – non-economic loss – s 151G *Workers Compensation Act 1987* (NSW) – whether primary judge was required to determine extent to which respondent would have developed pain and disability due to underlying conditions

[Old v Minter \[2021\] NSWCA 92](#)

NEGLIGENCE – damages – economic loss – loss of earning capacity – business losses incurred by appellant's employer – no evidence that plaintiff suffered loss of income for closed period

[Thorn v Monteleone; Thorn v Kelly \[2021\] NSWCA 319](#)

NEGLIGENCE – damages – challenge to award of damages made by primary judge to injured respondent – whether post-accident surveillance footage of respondent and medical evidence properly taken into account by primary judge – whether primary judge erred in making awards under certain heads of damage – credit-based factual findings by judge – no appellable error by primary judge established

[Top Hut Banoon Pastoral Co Pty Ltd t/as Trustee for the Wakefield Family Trust v Walker \[2021\] NSWCA 296](#)

DAMAGES – past and future economic loss – where employee suffered from PTSD and diabetes – where employee’s income in prior financial years modest – where unchallenged findings that job suited employee’s PTSD and intended to work full-time – where primary judge allowed deduction of 30 per cent for vicissitudes – whether error in award of past economic loss – whether error in award of future economic loss – whether error by primary judge not to refer to appellant’s medical reports material

DAMAGES – past domestic assistance and future commercial care – where employee’s son and friend provided gratuitous domestic assistance – whether threshold under s 15(3) Civil Liability Act met – where evidence that employee wanted to relieve son of duties of providing care – where future commercial care assessed at 8.5 hours a week – where primary judge allowed deduction of 15 per cent for vicissitudes – whether primary judge erred in award for past domestic assistance – whether primary judge should have allowed for greater reduction for vicissitudes

Dangerous recreational activities

[Cox v Mid-Coast Council \[2021\] NSWCA 190](#)

NEGLIGENCE – dangerous recreational activities – appellant suffered injury in mid-air collision between light aircraft and Ferris wheel – appellant engaged in dangerous recreational activity of landing at an unregulated aircraft landing area – whether appellant suffered harm as the result of the materialisation of an obvious risk of a dangerous recreational activity – appropriate level of generality when characterising risk – obviousness of risk – appellant’s harm resulted from manifestation of the obvious risk of colliding with obstructions in the splay of the landing area – appeal dismissed

Economic loss

[Old v Minter \[2021\] NSWCA 92](#)

NEGLIGENCE – damages – economic loss – loss of earning capacity – business losses incurred by appellant’s employer – no evidence that plaintiff suffered loss of income for closed period

[Ramsey v Denton \[2021\] NSWCA 310](#)

NEGLIGENCE – Damages – Economic loss – Earning capacity – Assessing loss of future earning capacity by way of buffer – Where primary judge reduced the period of earning capacity without a sufficient evidentiary basis – Appeal allowed

Employer liability

[Top Hut Banoon Pastoral Co Pty Ltd t/as Trustee for the Wakefield Family Trust v Walker \[2021\] NSWCA 296](#)

TORTS – negligence – liability of employer – scope of employer's obligation to ensure safe system of work – where employee worked as shearers' cook – where employee dispatched to other place or premises of work – where employee injured when step to accommodation collapsed – where employer conducted visual inspection of premises – whether scope of employer's duty required employer to conduct physical inspection of the step – whether employer breached duty – whether causation established

Medical negligence

[Makaroff v Nepean Blue Mountains Local Health District \[2021\] NSWCA 107](#)

NEGLIGENCE — medical negligence — breach of duty — whether failure to advise the appellant that it was essential and urgent to organise orthopaedic review of injured shoulder constituted breach

NEGLIGENCE — medical negligence — peer professional opinion – *Civil Liability Act 2002* (NSW) s 50 – whether the respondents acted in a manner that was widely accepted by peer professional opinion as competent professional practice

NEGLIGENCE — medical negligence — causation — factual causation — whether it was more probable than not that the appellant would have had a better outcome but for the negligence – whether the appellant would have consulted an orthopaedic surgeon – whether the appellant would have undergone surgery prior to her shoulder injury becoming inoperable

Motor vehicle accidents

[AAI Ltd t/as AAMI v Chan \[2021\] NSWCA 19](#)

ADMINISTRATIVE LAW - judicial review - *Motor Accidents Compensation Act 1999* (NSW), s 62 - application for further assessment - proper officer not to order further assessment unless additional relevant information capable of having a material effect on outcome of previous assessment - further medical opinions covering similar ground to opinions previously considered - further medical opinions accepted to be additional relevant information - whether judicially reviewable error in proper officer's decision that further medical opinions not capable of having material effect - need for identification of jurisdictional error or error of law on face of record - primary judge erred in finding reviewable error - appeal allowed and decision of proper officer restored

[Insurance Australia Group Ltd t/as NRMA Insurance v Keen \[2021\] NSWCA 287](#)

MOTOR ACCIDENTS – judicial review – assessment of permanent impairment – adequacy of assessor’s reasons – whether need to deal separately with further aspect of insurer’s case – requirement to distinguish jurisdictional error from error of law on face of record – requirement to state grounds of review with specificity

[Yebdoo v Holmewood \[2021\] NSWCA 119](#)

NEGLIGENCE – breach of duty – motor vehicle accident – failure to keep a proper lookout and slow vehicle

NEGLIGENCE – causation – factual causation – motor vehicle accident – whether expert opinion was necessary to establish causation – whether evidence of time and distance was too imprecise to support a finding of causation

Negligent misstatement

[Della Franca v Lorenzato; Burwood Council v Lorenzato \[2021\] NSWCA 321](#)

TORTS – negligent misstatement – whether a planning certificate issued by Council under s 149 of the Environmental Planning and Assessment Act contained negligent misstatements – whether resolution adopted by Council constituted a “policy” – whether any such policy was abandoned

TORTS – negligent misstatement – answers to requisitions supplied by vendor of real property did not contain misstatements

TORTS – negligent misstatement – s 43A Civil Liability Act – whether the issue of a planning certificate under s 149 Environmental Planning and Assessment Act constituted the exercise of a “special statutory power”

TORTS – negligent misstatement – s 733 Local Government Act – whether s 733 exemption from liability applied to s 149 planning certificate issued by Council – whether “advice... relating to the likelihood of any land being flooded”

Professional negligence

[Johnson v Firth \[2021\] NSWCA 237](#)

NEGLIGENCE – Breach – Standard of care – Professional negligence – Whether solicitor acted in a manner widely accepted in Australia by peer professional opinion as competent professional practice – Expert opinion adduced not determinative merely because not challenged on ground of irrationality – Where solicitor gave clear and repeated advice discouraging premature settlement at undervalue despite client’s perilous financial position

and desire for quick settlement – Where early settlement prudent given risk of future disclosure of information adverse to claim – Where accepted offer far from so unreasonable as to warrant warning against acceptance – No breach of duty of care

[Makaroff v Nepean Blue Mountains Local Health District \[2021\] NSWCA 107](#)

NEGLIGENCE — medical negligence — breach of duty — whether failure to advise the appellant that it was essential and urgent to organise orthopaedic review of injured shoulder constituted breach

NEGLIGENCE — medical negligence — peer professional opinion – *Civil Liability Act 2002* (NSW) s 50 – whether the respondents acted in a manner that was widely accepted by peer professional opinion as competent professional practice

NEGLIGENCE — medical negligence — causation — factual causation — whether it was more probable than not that the appellant would have had a better outcome but for the negligence – whether the appellant would have consulted an orthopaedic surgeon – whether the appellant would have undergone surgery prior to her shoulder injury becoming inoperable

[Bartier Perry Pty Ltd v Paltos \[2021\] NSWCA 158](#)

NEGLIGENCE – professional negligence – solicitors – where appellant law firm was retained to advise the respondent as to his rights in a family law partnership – whether appellant failed to give competent advice to the respondent about the manner and circumstances of the exercise of a put option granted by a put and call option agreement forming part of the partnership documents – breach of retainer and concurrent duty of care

NEGLIGENCE – professional negligence – causation – factual causation – where respondent would have exercised put option had he been properly advised of his rights – where failure to give competent advice caused loss

Public authorities

[Doyle's Farm Produce Pty Ltd v Murray Darling Basin Authority \(No 2\) \[2021\] NSWCA 246](#)

NEGLIGENCE – public authority – Murray Darling Basin Authority – Authority or its delegates alleged to have negligently released water causing damage to plaintiffs' lands – whether Authority or delegates a “public or other authority” within meaning of s 41 of Civil Liability Act 2002 (NSW)

Standard of care

[Johnson v Firth \[2021\] NSWCA 237](#)

NEGLIGENCE – Breach – Standard of care – Professional negligence – Whether solicitor acted in a manner widely accepted in Australia by peer professional opinion as competent professional practice – Expert opinion adduced not determinative merely because not challenged on ground of irrationality – Where solicitor gave clear and repeated advice discouraging premature settlement at undervalue despite client’s perilous financial position and desire for quick settlement – Where early settlement prudent given risk of future disclosure of information adverse to claim – Where accepted offer far from so unreasonable as to warrant warning against acceptance – No breach of duty of care

[Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd \[2021\] NSWCA 206](#)

TORTS – negligence – standard of care – acts or omissions of public authority – exercise of statutory function – statutory protection – application of *Wednesbury* standard of care – *Civil Liability Act 2003* (Qld) s 36

NEGLIGENCE – standard of care – conduct of flood operations – compliance with Flood Operations Manual – construction of Manual written by flood engineers for application by flood engineers – purposive construction – dual purposes of water supply and flood mitigation – concept of flood mitigation – releases not to exceed peak inflows – use of best available rainfall forecasts – degrees of tolerance – scope for professional judgment – role of the senior flood operations engineer in determining strategies

43. Torts (other)

Assault and battery

[Stanizzo v Fregnan; Stanizzo v Badarne; Stanizzo v State of New South Wales \[2021\] NSWCA 195](#)

TORTS — Trespass to the person — Battery — Sexual assault — where resolution of the issues depended on the assessment of the truthfulness of each party — no issue of principle

Deceit

[Maaz v Fullerton Property Pty Ltd \[2021\] NSWCA 79](#)

TORTS – deceit – misleading and deceptive conduct – false statutory declaration in support of payment claim – statement by builder that all subcontractors paid – statement known to be false – claim paid by principal – principal liable to unpaid subcontractors – loss suffered – payments to subcontractors recovered

[Johnson v Mackinnon \[2021\] NSWCA 152](#)

TORTS – Miscellaneous Torts – Deceit – Relationship with misleading or deceptive conduct
– Apportionment defence available for misleading and deceptive conduct but not for deceit

False imprisonment

[Harris v State of New South Wales \[2021\] NSWCA 208](#)

TORTS – Trespass to the person – False imprisonment – Wrongful arrest – Whether arrest wrongful where officer had additional purpose of interviewing arrestee and obtaining a “version” of events – Where officer nevertheless had requisite intention to charge – Secondary intention does not vitiate lawfulness of arrest

Malicious prosecution

[Rock v Henderson \[2021\] NSWCA 155](#)

TORTS – Malicious prosecution – Damage – Where limitations on recoverability of costs in subject proceedings – Whether legal costs of defence and lost earnings are actionable damage

TORTS – Malicious prosecution – Elements – Whether malice and absence of reasonable or probable cause adequately particularised – Whether necessary to show that prosecutor prejudiced by false information – Whether Apprehend Domestic Violence Order proceedings capable of founding malicious prosecution claim

[Stanizzo v Fregnan; Stanizzo v Badarne; Stanizzo v State of New South Wales \[2021\] NSWCA 195](#)

TORTS — Malicious prosecution — where defendant provided statement to police in connection with criminal investigation — whether defendant a prosecutor for purposes of the tort — whether defendant knowingly provided false information to a prosecuting authority

Nuisance

[Woodhouse v Fitzgerald \[2021\] NSWCA 54](#)

TORTS – nuisance – private nuisance – controlled burning – whether controlled burning can constitute private nuisance – whether strict liability

Trespass

[Harris v State of New South Wales \[2021\] NSWCA 208](#)

TORTS – Trespass to the person – False imprisonment – Wrongful arrest – Whether arrest wrongful where officer had additional purpose of interviewing arrestee and obtaining a “version” of events – Where officer nevertheless had requisite intention to charge – Secondary intention does not vitiate lawfulness of arrest

[Stanizzo v Fregnan; Stanizzo v Badarne; Stanizzo v State of New South Wales \[2021\] NSWCA 195](#)

TORTS — Trespass to the person — Battery — Sexual assault — where resolution of the issues depended on the assessment of the truthfulness of each party — no issue of principle

[Rock v Henderson \[2021\] NSWCA 155](#)

TORTS – Trespass to land – Damage – Whether distress to children of claimant actionable damage

44. Trade practices

Industry codes

[Joshan v Pizza Pan Group Pty Ltd \[2021\] NSWCA 219](#)

CONSUMER LAW – industry codes – Franchising Code of Conduct – what constitutes a “franchise agreement” – whether a deed of guarantee is a “franchise agreement” as defined in cl 5 of the Code – where the guarantors assumed certain obligations of the franchisee and covenanted to be personally bound by the terms and conditions of the Franchise Agreement pursuant to the deed of guarantee – where the deed of guarantee conferred no right to carry on the business of offering, supplying or distributing goods or services as a franchisee

CONSUMER LAW – industry codes – Franchising Code of Conduct, cl 21(2)(a) – where franchise agreement must not contain a clause that requires a party to the agreement to bring an action or proceedings in relation to a dispute under the agreement in any State or Territory outside that in which the franchised business is based – whether franchise agreement may contain a non-exclusive jurisdiction clause – where the prohibition refers to a clause that “requires” the parties to litigate in a particular forum

Misleading or deceptive conduct

[Johnson v Mackinnon \[2021\] NSWCA 152](#)

CONSUMER LAW – Misleading or deceptive conduct – Representations – Explicit false representations made in proposal document given to prospective investors in fraudulent betting syndicate scheme masterminded by notorious conman – Appellant a member of partnership promoting scheme – Whether appellant had knowledge of false representations – Whether appellant jointly and severally liable for misrepresentations made in ordinary course of business of partnership – Liability established

CONSUMER LAW – Misleading or deceptive conduct – Silence or non-disclosure – Whether appellant represented that conman not involved in scheme – Whether appellant had knowledge of various prerequisite facts such as notoriety, involvement, and alias of conman, and of need to conceal such information – Appellant unable to demonstrate any of these findings as glaringly improbable – Appellant ought to have known of reasonable expectation that conman’s involvement would be disclosed – Appellant did not disclose and deliberately concealed conman’s involvement

CONSUMER LAW – Misleading or deceptive conduct – Causation or reliance – Whether respondent’s decision to invest caused by proposal representations – Whether prospective investor would have been deterred by knowledge of involvement of notorious conman – Gullible investors not disentitled to protection

CONSUMER LAW – Misleading or deceptive conduct – Remedies – Quantification of damages – Whether primary judge failed to account for group members’ prior recoveries and respondent’s trading profits received from scheme – Award of damages below only for respondent’s unpaid loan to scheme – Prior recoveries and trading profits irrelevant

[Bartier Perry Pty Ltd v Paltos \[2021\] NSWCA 158](#)

CONSUMER LAW – misleading or deceptive conduct – professional advice – where a dangerously incomplete statement of the respondent’s rights was misleading and deceptive in that it was apt to mislead the respondent into believing that his legal rights were ineffective

45. Traffic law and transport

Aviation

[Sydney Seaplanes Pty Ltd v Page \[2021\] NSWCA 204](#)

TRAFFIC LAW AND TRANSPORT – aviation – carriage by air – death or personal injury – intra-state carriage by air occurring entirely within New South Wales – where party brought claim under s 5 of the *Civil Aviation (Carriers’ Liability) Act 1967* (NSW) in the Federal Court – where Federal Court lacked jurisdiction to decide claim – claimant brought claim in the Supreme Court under s 11(2) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW) – whether order of the Federal Court dismissing claim for want of jurisdiction was a “relevant order” within the meaning of s 11(1) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW)

TRAFFIC LAW AND TRANSPORT – aviation – statutory liability – limitation of actions – characterisation of statutory bar – whether s 34 of the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) is a “limitation law” within the meaning of s 11(1) of the *Federal Courts (State Jurisdiction) Act 1999* (NSW)

46. Valuation

Compulsory acquisition of land

[Council of the City of Ryde v Azizi \[2021\] NSWCA 165](#)

LAND LAW – compulsory acquisition of land – payment required by *Land Acquisition (Just Terms Compensation) Act 1991* (NSW), s 68(2)(a) – whether payment into trust account of acquiring authority’s solicitor satisfied obligation

Contingencies

[Wardy v NSW Trustee and Guardian \[2021\] NSWCA 121](#)

VALUATION – courts and tribunals – appeals – whether judge erred in discounting value of property for contingencies – acceptance of expert evidence required evaluative conclusions to be made – standard of appellate review analogous to that described in *House v The King*

47. Vexatious proceedings

Application to set aside vexatious proceedings order

[Mohareb v Palmer \(No 3\) \[2021\] NSWCA 39](#)

APPEAL – application for leave to appeal – applicant subject to vexatious proceedings order – whether leave required to file summons seeking leave to challenge order – appeal heard – whether leave required to file notice of motion seeking to vary orders

CIVIL PROCEDURE – parties – vexatious litigants – leave to institute proceedings – whether leave required to file application to appeal vexatious proceedings order – whether leave required to file notice of motion seeking to vary orders made on appeal

Vexatious litigants

[Clarke v South Eastern Sydney Local Health District \[2021\] NSWCA 43](#)

CIVIL PROCEDURE — parties — vexatious litigants — stay of proceedings — application for leave to appeal from stay — application for stay of orders of primary judge

[Clarke v South Eastern Sydney Local Health District \[2021\] NSWCA 84](#)

CIVIL PROCEDURE — parties — vexatious litigants — stay of proceedings — appeal from stay — whether primary judge made any legal or factual error

[Wang v Purpose Pty Ltd t/as Botany View Hotel \[2021\] NSWCA 10](#)

CIVIL PROCEDURE – parties – vexatious litigants – limited vexatious proceedings order in relation to applicant – primary judge extended vexatious proceedings order – *Vexatious Proceedings Act* ss 8, 9 – application for leave to appeal filed late – no sensible argument advanced nor any explanation for lateness

Where vexatious proceedings order later set aside on appeal

[Mohareb v Kelso \[2021\] NSWCA 103](#)

APPEALS – leave to appeal – applicant’s notice of motion dismissed by Registrar – whether primary judge in error in refusing to set aside that dismissal – whether applicant’s amended summons was taken to be dismissed by operation of the *Vexatious Proceedings Act* – relevant vexatious proceedings order later set aside on appeal – arguable basis for challenging those orders demonstrated – leave to appeal granted on a limited basis

48. Workers compensation

Causal link between employment and harm suffered

[Liddell Coal Operations Pty Limited v Hector \[2021\] NSWCA 47](#)

WORKERS COMPENSATION – coal miners – whether employment was a contributing factor to aggravation, acceleration, exacerbation or deterioration of a disease – where worker suffered from a degenerative condition of osteoarthritis to his right knee – whether primary judge erred in point of law in finding work injury – *Workers Compensation Act 1987* (NSW), s 4(b)(ii)

Degree of permanent impairment

[Ozcan v Macarthur Disability Services Ltd \[2021\] NSWCA 56](#)

WORKERS COMPENSATION – compensation for non-economic loss – determining degree of permanent impairment – worker suffered injuries to shoulder and spine in an incident and suffered further injuries to spine in later incidents – whether WPI resulting from injuries should be aggregated – injuries from first incident materially contributed to injuries in later incidents – all injuries “resulted from” and “arose out of” first incident

WORKERS COMPENSATION – proceedings before Commission – appeal against decision of presidential member in point of law – whether presidential member erred in construing s 322(2) and (3) of *Workplace Injury Management and Workers Compensation Act 1998* – error of law established and issue in question potentially a matter of some significance – leave to appeal granted

[Skates v Hills Industries Ltd \[2021\] NSWCA 142](#)

WORKERS COMPENSATION – referral of medical dispute to approved medical officer – assessment of permanent impairment – whether approved medical officer is confined to an assessment of the body parts and systems specified by the Registrar in the referral form

WORDS AND PHRASES – “medical dispute”

[Sydney Trains v Batshon \[2021\] NSWCA 143](#)

ADMINISTRATIVE LAW - workers compensation - examination by approved medical specialist - request for re-examination by appeal panel refused - primary judge held that request not considered by appeal panel - appeal panel in fact considered request - adequacy of reasons of appeal panel - whether denial of procedural fairness by primary judge - whether any denial could be material in light of the right of appeal by way of rehearing - whether other judicially reviewable errors in appeal panel’s decision - consideration of differences in assessment regimes under workers compensation and motor accident legislation - appeal allowed and decision of appeal panel reinstated

Entitlement to compensation

[Theoret v Aces Incorporated \[2021\] NSWCA 3](#)

STATUTORY INTERPRETATION — Amendment — where appellant’s entitlement to weekly workers compensation payments arose before but was not determined until after 2012 amendments to *Workers Compensation Act 1987* (NSW) came into force — whether s 82A of Act as currently in force entitles the appellant to have pre-injury average weekly earnings indexed historically from the time she first became eligible to receive weekly payments in respect of the relevant injury or only from the time the amendments came into force in 2012

Medical assessment

[Queanbeyan Racing Club Ltd v Burton \[2021\] NSWCA 304](#)

WORKERS COMPENSATION – medical dispute – appeal from certificate of assessor – scope of functions and powers of appeal panel – panel restricted to determining whether

error in applicant's grounds of appeal – decision to issue new certificate – no expansion of panel's functions

[Sleiman v Gadalla Pty Ltd \[2021\] NSWCA 236](#)

WORKERS COMPENSATION – medical assessment – appeal from approved medical specialist to Appeal Panel – whether second appeal to Appeal Panel available on ground of deterioration – whether application for further appeal should have been treated as application for reconsideration, or whether notice to applicant should have been given, before application dismissed

Non-economic loss

[Ozcan v Macarthur Disability Services Ltd \[2021\] NSWCA 56](#)

WORKERS COMPENSATION – compensation for non-economic loss – determining degree of permanent impairment – worker suffered injuries to shoulder and spine in an incident and suffered further injuries to spine in later incidents – whether WPI resulting from injuries should be aggregated – injuries from first incident materially contributed to injuries in later incidents – all injuries “resulted from” and “arose out of” first incident

Uninsured liabilities

[Thorn v Monteleone; Thorn v Kelly \[2021\] NSWCA 319](#)

WORKERS COMPENSATION – uninsured liabilities – payments of workers compensation by Nominal Insurer to injured worker – partial reimbursement to Nominal Insurer by employers – third party tortfeasor liable for worker's injury – whether employers able to claim against third party tortfeasor under s 151Z(1)(d) *Workers Compensation Act* for all of workers compensation payments made – proper construction of s 151Z(1)(d) – meaning of “the person by whom the compensation was paid” – employers properly to be regarded as person by whom compensation paid

Speeches and papers delivered in 2021

The Honourable Justice T F Bathurst AC, Chief Justice of NSW	21st Century Legal Practice: International and Domestic – Chief Justices Past and Present Dispute Resolution Lecture Series	November 2021
	Modern and Future Judging - Sir Maurice Byers Lecture 2021	November 2021
	Commercial Trusts and the Liability of Beneficiaries: Are Commercial Trusts a Satisfactory Vehicle to be used in Modern Day Commerce? 2021 Harold Ford Memorial Lecture	October 2021
	Persuasive Criminal Advocacy	July 2021
	Opening Remarks: UNSW Evening with a Justice	June 2021
	Introductory Remarks: Murder at Myall Creek Lecture	5 May 2021
	Challenges to the Rule of Law in Modern Society	April 2021
	Trust in the Judiciary – Opening of Law Term Dinner	February 2021
	Remarks: Australian Disputes Centre 35th Anniversary of	January 2021

	Mediation Training Program	
The Honourable Justice A S Bell, President of the Court of Appeal	Gambling, the Law and the 21st Century - LAWASIA 2021 'Virtual' Annual Conference	November 2021
	'Disputes with International Dimensions', Supreme Court of Western Australia Annual Conference	October 2021
	'The rule of law and the Constitution – a short overview', Centre for Comparative Constitutional Studies, University of Melbourne Law School, Constitutional Law Conference 2021	July 2021
	Recent Recurring Issues in the Court of Appeal - District Court of NSW Annual Conference	April 2021
The Honourable Justice J Basten	EPLA Conference: Year in Review – Cases in The Court of Appeal	November 2021
The Honourable Justice M J Leeming	Launch of "So Help Me God – A History of Oaths of Office"	June 2021
	The Bathurst Lecture 2021: The enduring qualities of commercial law	April 2021
	Injunctions in criminal law (2021) 95 ALJ 18	January 2021